Case Comments

Government Immunity from Local Zoning Restrictions: The Balancing Test of *Brownfield v. State*

Courts frequently confront and resolve issues of government immunity from local zoning restrictions.[1] In some circumstances, the proper judicial resolution of the issue is clearly settled. For example, activities of the federal government are immune from local zoning restrictions under the supremacy clause of the United States Constitution,[2] and in cases involving activities of a state, its authorized agents, or its political subdivisions,[3] the state legislature may provide by statutory enactment that an activity is not subject to local zoning restrictions.[4] This Case Comment is concerned with the more difficult cases that arise when the legislature provides no clear answer to the question whether a state activity is immune from local zoning restrictions.[5] Statutes authorizing state activities are usually silent on the subject of state immunity from local zoning restrictions, and the absence of express legislative solutions has "led to a rash of litigation arising from the attempts of municipalities to enforce their zoning ordinances . . . against other state agencies, and of the agencies to obtain immunity to these regulations."[6]

State courts have developed a number of approaches for resolving conflicts between state activities and local zoning restrictions when the conflicts are not clearly resolved by legislative enactments. Traditionally, the courts have held state activities to be immune from local zoning restrictions when the activities can be either classified as "governmental," rather than "proprietary,"[7] or supported by the power of eminent domain.[8] In *Brownfield v. State*,[9] the Supreme Court of Ohio rejected these traditional approaches and

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1. *See* Annot., 61 A.L.R.2d 970 (1958).

2. U.S. CONST. art. VI, cl. 2. United States v. City of Chester, 144 F.2d 415, 419–20 (3rd Cir. 1944). *See generally* 2 R. ANDERSON, AMERICAN LAW OF ZONING § 12.07 (2d ed. 1976).

3. In this Case Comment, "state" is an inclusive reference to the state, its authorized agents, and its political subdivisions, unless the context dictates a narrower meaning. Brownfield v. State, 63 Ohio St. 2d 282, 407 N.E.2d 1365 (1980), appears to adopt a similar view. In the only decision applying *Brownfield*, the Court of Appeals of Ohio for the Eighth District strongly intimated that *Brownfield*'s balancing of public interests test is applicable to all "conflict[s] between the right of one governmental unit to condemn and use [land] and another to zone." Board of Educ. v. Puck, No. 999,280, slip op. at 5 (8th Judicial Dist. Ct. App. Ohio Nov. 20, 1980). Applying a single test to resolve all intergovernmental conflicts between zoning regulations and land use, without regard for the unit of government imposing the regulations or proposing the land use, appears preferable to allowing the class of governmental units to determine the applicable test. *See, e.g.*, note 199 and accompanying text *infra*.

4. *See* text accompanying notes 215–24 *infra*.

5. Brownfield v. State, 63 Ohio St. 2d 282, 407 N.E.2d 1365 (1980), fits within this rubric because the state acquired and did not construct the halfway house. *See* text accompanying note 223 *infra*.

6. Note, *Municipal Power to Regulate Building Construction and Land Use by Other State Agencies*, 49 MINN. L. REV. 284, 285 (1964).

7. *See* text accompanying notes 138–66 *infra*.

8. *See* text accompanying notes 31–88 *infra*.

9. 63 Ohio St. 2d 282, 407 N.E.2d 1365 (1980).

adopted a balancing of governmental interests test to resolve issues of state immunity from local zoning restrictions. This Case Comment compares the *Brownfield* balancing test with the traditional judicial approaches to the immunity issue. The Comment focuses on conceptual and practical difficulties with both the eminent domain test and the governmental-proprietary use distinction and concludes that the *Brownfield* balancing test is a preferable method for resolving conflicts between state activities and local zoning restrictions.

I. FACTS AND HOLDING OF *BROWNFIELD V. STATE*

Brownfield involved a dispute between the state of Ohio, as lessor and owner of a halfway house for patients discharged from a psychiatric hospital, and property owners living close to the proposed facility. The facility was a single-family residence purchased by the state for the purpose of reestablishing "basic living skills for those who have been institutionalized for long periods of time."[10] No more than five residents, together with a resident manager, were to live in the facility at any given time. The resident manager was to be employed by Western Reserve Psychiatric Services, Inc., the lessee. The state, as lessor and owner, was to be responsible for maintenance and the facility's proper operation.

The plaintiff-appellants[11] in *Brownfield* sought declaratory and injunctive relief, claiming the operation of the facility would violate a city zoning ordinance restricting the area in which the facility was located to single-family residential uses. The trial court entered judgment for the defendants,[12] permitting operation of the facility under the local zoning restrictions.[13] The judgment was supported by the trial court's alternative holdings that the proposed halfway house was a permitted use in an area zoned single-family residential[14] and that the facility was immune from local zoning restrictions under the eminent domain test.[15] The court of appeals affirmed the trial court's holding that the facility was immune from local zoning restrictions under the eminent domain test and did not reach the question whether a halfway house is a permitted use in an area zoned single-family residential.[16]

In the supreme court, the principle issue was "whether a privately-operated, state-owned facility is automatically exempt from municipal zoning

10. *Id.* at 282, 407 N.E.2d at 1365.

11. Plaintiff-appellants in *Brownfield* were the city of Akron and "owners of property in close proximity to the" proposed halfway house. *Id.*, 407 N.E.2d at 1366. The city of Akron was not an original party-plaintiff in the trial court. Plaintiff property owners named the city of Akron as a defendant in their original action and the trial court realigned the city as a party-plaintiff at the city's request. *Id.* at 283 n.1, 407 N.E.2d at 1366 n.1.

12. Defendants in the trial court and defendant-appellees in the court of appeals and the Supreme Court of Ohio were the State of Ohio, the Akron Superintendent of Building Inspection and Regulation, and Western Reserve Psychiatric Services, Inc. *Id.* at 282–83, 407 N.E.2d at 1366.

13. Brownfield v. State, No. 77–12–2995 (Summit County, Ohio, C.P. June 12, 1978).

14. *Id.* at 10–11.

15. *Id.* at 7–9.

16. Brownfield v. State, Nos. 8991 and 8992, slip op. at 7–10 (9th Judicial Dist. Ct. App. Ohio May 2, 1979).

restrictions."[17] Defendant-appellees urged the court to resolve this issue under the eminent domain test, the traditional approach of the Ohio courts for resolving issues of state immunity from local zoning restrictions.[18] Plaintiff-appellants urged the court to resolve the dispute under the governmental-proprietary use distinction.[19] The court rejected both approaches and embraced a balancing of public interests test for resolving issues of state immunity from local zoning restrictions.[20] Without reaching the issue whether operation of the proposed halfway house was immune from local zoning restrictions, the court reversed the judgment of the court of appeals and remanded the case.[21] The reversal and remand were based on alternative findings by the supreme court that the court of appeals failed "to pass on appellants' contention that the trial court erred in finding the proposed halfway house to be a permitted use in a single-family residential district"[22] and "the state of Ohio made no effort to comply with the . . . [local] zoning ordinance" or consider "the impact of the proposed halfway house upon the surrounding neighborhood."[23]

Brownfield is the first controlling Ohio case explicitly adopting the balancing of public interests test for the resolution of conflicts between state activities and local zoning restrictions.[24] The test provides that when a state activity conflicts with local zoning restrictions and the conflict is not resolved by a "direct statutory grant of immunity" for the activity, the state must make "a reasonable attempt to comply with the zoning restrictions of the affected

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17. 63 Ohio St. 2d 282, 284, 407 N.E.2d 1365, 1367.

18. *Id.*

19. *Id.* at 286, 407 N.E.2d at 1368.

20. *Id.* at 284–86, 407 N.E.2d at 1367–68. Before reaching the zoning immunity issue, the court addressed a jurisdictional challenge raised by the state of Ohio and dismissed the state as a party to the cause. The state's contention was that it could not be "subjected to suit in its own courts absent its consent." *Id.* at 283, 407 N.E.2d at 1366. In spite of the dismissal of the state of Ohio as a party, the issue remained "whether a privately-operated, state-owned facility is automatically exempt from municipal zoning restrictions." *Id.* at 284, 407 N.E.2d at 1367. Thus, *Brownfield*'s holding clearly extends to state-owned facilities.

In general, when state courts apply doctrines of state immunity from local zoning restrictions, the courts tend not to distinguish between facilities owned and operated by the state and state-owned facilities operated by private individuals or organizations to serve a public purpose. *See generally* Annot., 84 A.L.R.3d 1187 (1978). The result in one early Ohio case suggests local zoning restrictions are inapplicable to the activities of state-regulated public utilities vested with the public power of eminent domain. *See* Norfolk & Western Ry. v. Gale, 119 Ohio St. 110, 162 N.E. 385 (1928), and text accompanying notes 45–53 *infra*. *But see* State *ex rel.* Kearns v. Ohio Power Co., 163 Ohio St. 451, 127 N.E.2d 394 (1955). In *Kearns*, the Supreme Court of Ohio held that the authority of a county planning commission extends to the construction of electric power lines by a state regulated public utility. The power company argued that it should not be subject to the authority of the commission, basing this argument on the holding of State *ex rel.* Ellis v. Blakemore, 116 Ohio St. 650, 157 N.E. 330 (1927) (erection of a bridge or viaduct by county pursuant to state law not subject to municipal zoning restrictions). The *Kearns* court rejected the power company's argument on the grounds that *Blakemore* "dealt with the right of an *agency of the state government under express statutory authority* to construct a viaduct . . . and [was] hardly in point." 163 Ohio St. 451, 462, 127 N.E.2d 394, 400 (1955) (emphasis in original).

21. 63 Ohio St. 2d 282, 287, 407 N.E.2d 1365, 1368 (1980).

22. *Id.*

23. *Id.*

24. Prior to *Brownfield*, Ohio courts subscribed to the eminent domain test to resolve issues of state immunity from local zoning restrictions. *See* text accompanying notes 34–88 *infra*. However, one court of appeals seems to have subscribed to a balancing test. *See* Board of Park Comm'rs v. Bay Village, 78 Ohio L. Abs. 389, 131 N.E.2d 628 (Ct. App. 1957).

political subdivision."[25] If the state cannot achieve compliance with local zoning restrictions after reasonable efforts, the issue of the state's immunity from local zoning restrictions is resolved by weighing the public interests served by the proposed state activity against the public interests served by enforcing the local zoning restriction.[26]

The balancing of public interests test adopted in *Brownfield* differs substantially from traditional judical approaches to the immunity question under the eminent domain test and the governmental-proprietary use distinction. Judicial resolution of the immunity issue under these traditional approaches is based on factors wholly unrelated to the public interests served by local zoning restrictions.[27]

II. The Eminent Domain Test and the Governmental-Propietary Use Distinction

Brownfield explicitly rejected the eminent domain test and the governmental-proprietary use distinction.[28] The eminent domain test was rejected because its underlying rationale—that public interests are superior to private interests—is irrelevant to the resolution of intergovernmental conflicts.[29] The governmental-proprietary use distinction was rejected in *Brownfield* because it is difficult to apply and relies on criteria that do not reflect "the realities of governmental activity."[30] An examination of cases applying the eminent domain test and the governmental-proprietary use distinction confirms the reasoning underlying *Brownfield*'s rejection of these tests and reveals additional problems with these traditional judicial approaches to the immunity question.

A. *Ohio's Traditional Eminent Domain Test*

Ohio courts have traditionally resolved issues of state immunity from local zoning restrictions by resorting to an eminent domain test.[31] Under this test, state activities are absolutely immune[32] from local zoning restrictions if the activities are conducted on land that was or could have been acquired by appropriation.[33]

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25. 63 Ohio St. 2d 282, 286, 407 N.E.2d 1365, 1368 (1980).

26. *Id.* at 285, 407 N.E.2d at 1367.

27. *See* text accompanying notes 31–88 and 134–66 *infra*.

28. 63 Ohio St. 2d 282, 284–86, 407 N.E.2d 1365, 1367–68 (1980).

29. *Id.* at 284–85, 407 N.E.2d at 1367.

30. *Id.* at 286, 407 N.E.2d at 1368.

31. "The view has gained some ascendancy, notably in Georgia and Ohio, that zoning ordinaces are inapplicable to governmental projects for the construction of which the agency in question has the power to condemn or appropriate lands by the power of eminent domain." Annot., 61 A.L.R.2d 978 (1958).

32. *But see* text accompanying notes 68–74 *infra*.

33. The cases do not require that land actually be acquired by the process of appropriation. *See, e.g.*, City of Heath v. Licking County Regional Airport Auth., 16 Ohio Misc. 69, 237 N.E.2d 173 (Licking County C.P. 1967) (county airport expansion on land donated by industry immune from local zoning restrictions). This sweeping rule can be defended on the ground that government would simply appropriate the land in question if the rule were drawn more narrowly. *See generally* City of Scottsdale v. Municipal Court, 90 Ariz. 393, 398–99, 368 P.2d 637, 640 (1962).

1. *Evolution of the Eminent Domain Test in Ohio*

The origins of Ohio's common law eminent domain test are found in cases involving disputes that arose between private landowners and the state when the state's proposed use of land violated private covenants in deeds of sale. The earliest Ohio decision involving an alleged breach of a private covenant by an agent of the state possessing powers of eminent domain is *Doan v. Cleveland Short Line Railway*.[34] In *Doan*, plaintiff owned and resided upon a lot in a residential development.[35] The lot was originally part of a larger tract of land owned by a developer who had subdivided the tract into lots and placed in the deed of sale for each lot a covenant restricting use of the lot to residential purposes.[36] Defendant railroad, a public utility invested by the state with the power of eminent domain, purchased several lots in the development and extended a freight line on the purchased land.[37] Plaintiff filed an action for damages based on defendant's use of the lots in a manner contrary to the convenants in plaintiff's and defendant's deeds of sale.[38] The trial court rendered judgment for defendant and the court of appeals affirmed.[39]

The Supreme Court of Ohio considered the question whether a public utility invested with powers of eminent domain could be subject to the private covenants in the deeds of sale.[40] Affirming the lower courts, the supreme court characterized defendant's use of the lots for railway purposes as a "public purpose"[41] and held that restrictive covenants in deeds of sale "cannot be construed as applying to the state or any of its agencies vested with the power of eminent domain in the use of lots for public purposes."[42] Plaintiff's prayer for damages was dismissed on the ground that "where a company or any agency of the state vested with the right of eminent domain has acquired lots in . . . an allotment and is using the same for public purposes, no claim for damages arises in favor of the owners of the other lots on account of such use."[43] The rationale for the decision in *Doan* was that the power of eminent domain is designed to serve public purposes that are superior to the private interests served by the restrictive covenants.[44]

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34. 92 Ohio St. 461, 112 N.E. 505 (1915). On the same day it decided *Doan*, the court also issued a brief per curiam decision in Ward v. Cleveland Ry. Co., 92 Ohio St. 471, 112 N.E. 507 (1915). *Ward* involved facts precisely parallel to *Doan*, and the court disposed of the case relying solely on *Doan's* eminent domain rationale. *Id.* at 472, 112 N.E. at 508.

35. 92 Ohio St. 461, 461–62, 112 N.E. 505, 505 (1915).

36. *Id.* at 462–63, 112 N.E. at 505.

37. *Id.* at 465, 112 N.E. at 506.

38. *Id.* at 466, 112 N.E. at 506. Plaintiff's theory was that "defendant has taken possession of and is occupying and using the private property and interest in land of the plaintiff," the property interest being the covenants running with all the lots. *Id.*

39. *Id.*

40. *Id.* at 468, 112 N.E. at 506.

41. *Id.* at 470, 112 N.E. at 507.

42. *Id.*

43. *Id.* at 461, 112 N.E. at 505.

44. The court noted, "The right of eminent domain rests upon public necessity, and a contract or covenant or plan of allotment which attempts to prevent the exercise of that right is clearly against public policy and is therefore illegal and void." *Id.* at 468–69, 112 N.E. at 507.

Norfolk & Western Railway v. Gale[45] represents the first extension of *Doan* to situations involving public zoning restrictions. In *Gale*, a railroad, acting through its subsidiary holding company, "purchased certain property in the Eastgate addition to the city of Columbus."[46] All deeds of sale for property in the Eastgate addition contained covenants restricting use of the property to residential purposes.[47] Defendant railroad proposed to use its Eastgate property for nonresidential purposes,[48] and plaintiffs, owners of residential property in the Eastgate addition, brought suit seeking an injunction prohibiting nonresidential use of the railroad's property. Plaintiffs' position was that the injunction should remain in effect until defendant acquired plaintiffs' property rights in the restrictive covenants through the exercise of defendant's powers of eminent domain.[49] In an amended petition to the trial court, plaintiffs also cited various provisions of the Columbus zoning ordinance "regulating the location, use, and height of structures."[50] The trial court refused to grant the injunction sought by plaintiffs, but the court of appeals reversed.[51]

The supreme court reversed the court of appeals "under the rule announced in the *Doan* case."[52] The only reference in the court's opinion to plaintiffs' reliance on provisions of the Columbus zoning ordinance appears in the recitation of facts. The court noted, "The amendment to . . . [plaintiffs'] petition also sets up the zoning ordinance of the city of Columbus, regulating the location, use, and height of structures, and premises and the area of lots and yards, passed August 6, 1923, which it is claimed relates to the property in question."[53] The court did not explicitly hold that the provisions of the zoning ordinance were inapplicable to the railroad's property, and the opinion offers no rationale for extending *Doan*'s reasoning to cases involving public zoning restrictions rather than private covenants. Nonetheless, *Gale* is significant because, given the facts of the case, the result sub silencio bridged the gap between the use of the eminent domain test in situations involving private covenants and its use in situations involving local zoning ordinances.

The first Ohio case that expressly extended the eminent domain test to situations involving public zoning ordinances was *Helsel v. Board of County Commissioners*.[54] *Helsel* involved a dispute between a private landowner and Cuyahoga County over the county's acquisition of a private airport. The airport was located in two villages, both of which passed zoning ordinances

45. 119 Ohio St. 110, 162 N.E. 385 (1928).

46. *Id.* at 110, 162 N.E. at 385.

47. *Id.* at 112, 162 N.E. at 385.

48. The court noted that "the land is to be used for the purposes of a railroad yard, railroad switching tracks, offices, and other purposes incident to a railroad yard." *Id.* at 111, 162 N.E. at 385.

49. *Id.*

50. *Id.* at 112, 162 N.E. at 385.

51. *Id.*, 162 N.E. at 386.

52. *Id.* at 113, 162 N.E. at 386.

53. *Id.* at 112, 162 N.E. at 385.

54. 37 Ohio Op. 58, 79 N.E.2d 698 (Cuyahoga County C.P. 1947), *aff'd*, 83 Ohio App. 388, 78 N.E.2d 694, *appeal dismissed*, 149 Ohio St. 583, 79 N.E.2d 911 (1948).

that restricted the airport land within their boundaries to residential use.[55] Moreover, a federal court had enjoined private operation of the airport "on the ground that said use constituted a nuisance."[56] The voters of Cuyahoga County passed a referendum authorizing the issuance of bonds to finance the acquisition of a site for a county airport, and the board of county commissioners resolved to appropriate the private airport property for this purpose.[57] Plaintiff, a taxpayer and property owner in one of the villages and the plaintiff in the earlier nuisance action in federal court, sought to enjoin the sale of bonds for airport construction and to require the county to reconvey the land to its original owners.[58] Among the arguments advanced by the plaintiff was that the village zoning ordinances prohibited the use of the airport property for nonresidential purposes.[59] The trial court rejected this argument and held that the county's use of the land for a public airport was immune from local zoning restrictions because the land was acquired by appropriation.[60] The court relied on *Doan, Gale,* and *Cincinnati v. Wegehoft*[61] for the proposition that "restrictions in zoning ordinances of municipalities are ineffective to prevent the use of land by a county for the public purpose for which it has been appropriated."[62] The court of appeals affirmed, finding itself "in full accord" with the reasoning of the trial court.[63]

Two aspects of *Helsel* are significant. First, because *Helsel* was the first Ohio case explicitly extending the eminent domain test to conflicts between state activities and local zoning restrictions, the trial court offered a rationale for resolving such conflicts by this test. The rationale focused on the justification for subjecting private land use activities to local zoning restrictions and demonstrated that this justification does not support the application of zoning restrictions to state activities.[64] The court indicated that the application of zoning restrictions to private property rests "on the theory that . . . [zoning restrictions] bear a real and substantial relation to the public welfare" and on "the principle that the exercise of rights incident to the ownership of private property may be restricted in the interests of the general welfare."[65] Situations involving the application of zoning ordinances to public property and

55. 37 Ohio Op. 58, 58, 79 N.E.2d 698, 701 (Cuyahoga County C.P. 1947).

56. *Id.* The federal court opinion was Swetland v. Curtis-Wright, Inc., 55 F.2d 201 (6th Cir. 1932).

57. 37 Ohio Op. 58, 58, 79 N.E.2d 698, 700–01 (Cuyahoga County C.P. 1947).

58. *Id.* at 59, 79 N.E.2d at 701.

59. *Id.*

60. *Id.* at 61–62, 79 N.E.2d at 704–05.

61. 119 Ohio St. 136, 162 N.E. 389 (1928). In *Wegehoft,* the Supreme Court of Ohio approved a provision in a municipal zoning ordinance enacted by the city of Cincinnati. The provision exempted the city's buildings from zoning restrictions. In dicta the court stated that the provision exempting the city's buildings "was not at all necessary in order to clothe the city with the power to acquire property upon which to erect necessary public buildings in the restricted residential zone." *Id.* at 137, 162 N.E. at 390. *Helsel* interprets this language as a reference to zoning immunity based on the city's power of eminent domain. 37 Ohio Op. 58, 62, 79 N.E.2d 698, 704 (Cuyahoga County C.P. 1947).

62. 37 Ohio Op. 58, 62, 79 N.E.2d 698, 705 (Cuyahoga County C.P. 1947).

63. Helsel v. Board of County Comm'rs, 83 Ohio App. 388, 392, 78 N.E.2d 694, 695 (1947).

64. 37 Ohio Op. 58, 61–62, 79 N.E.2d 698, 704–05 (Cuyahoga County C.P. 1947).

65. *Id.* at 62, 79 N.E.2d at 705.

activities were distinguishable because "the presumption is that the use of public property for public purposes is designed to promote the general welfare also."[66] This reasoning, coupled with the court's reliance on *Doan, Gale,* and *Wegehoft,* formed the basis for the court's holding.[67]

The second significant aspect of *Helsel* is its clear departure from the rule of absolute immunity set forth in other Ohio cases applying the eminent domain test.[68] Under the rule of absolute immunity, the only inquiry for the court is whether the state activity is supported by the power of eminent domain. If state law authorizes the appropriation of land for the activity, the activity is immune from local zoning restrictions and the court's inquiry is ended.[69] *Helsel's* rule of qualified immunity extends the court's inquiry a step further. Under *Helsel,* not only must the state's activity be supported by the power of eminent domain, but the state must also take account of the nature of the neighborhood in which it proposes to undertake an activity.[70] Some neighborhoods are "palpably unsuited to the proposed public use" and private property is protected by law "from the encroachment of public works constituting or creating nuisances."[71] According to the *Helsel* opinion, "These matters involve a want of good faith on the part of administrative public officials in the selection of locations and in all such cases appropriate relief will be granted by the courts."[72] The trial court did not grant the injunctive relief sought by the plaintiff in *Helsel* because "[n]o evidence of bad faith on the part of the county commissioners in selecting the site" for the airport was shown.[73] The court concluded that the county commissioners had acted in good faith because the airport site was located in a sparsely settled area and "it [did] not appear that the use of the site as an airport [would] constitute an intrusion upon highly developed residential sections."[74]

The Supreme Court of Ohio firmly embraced the eminent domain test for the first time in *Ohio Turnpike Commission v. Allen.*[75] Allen, the secretary-

66. *Id.*

67. *Id.*, 79 N.E.2d at 704. *Helsel* also relied on the persuasive authority of Decatur Park Dist. v. Becker, 368 Ill. 442, 14 N.E.2d 490 (1938), which held that a park district may condemn land and put it to use as a park in an area zoned residential, and In Petition of the City of Detroit, 308 Mich. 480, 14 N.W.2d 140 (1939), in which a township ordinance prohibiting the use of land for an airport was held unenforceable because it conflicted with a state statute authorizing the acquisition of land for the airport. 37 Ohio Op. 58, 62, 79 N.E.2d 698, 705 (Cuyahoga County C.P. 1947).

68. *See* State *ex rel.* Ohio Turnpike Comm'n v. Allen, 158 Ohio St. 168, 107 N.E.2d 345, *cert. denied sub nom.* Balduff v. Ohio Turnpike Comm'n, 344 U.S. 865 (1952). *Allen,* the only case decided by the Supreme Court of Ohio under the eminent domain test, makes no inquiry into the good faith of the state. *See* text accompanying notes 75–80 *infra.*

69. *See* State *ex rel.* Ohio Turnpike Comm'n v. Allen, 158 Ohio St. 168, 107 N.E.2d 345, *cert. denied sub nom.* Balduff v. Ohio Turnpike Comm'n, 344 U.S. 865 (1952).

70. Helsel v. Board of County Comm'rs, 37 Ohio Op. 58, 62, 79 N.E.2d 698, 705 (Cuyahoga County C.P. 1947).

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. 158 Ohio St. 168, 107 N.E.2d 345, *cert. denied sub nom.* Balduff v. Ohio Turnpike Comm'n, 344 U.S. 865 (1952).

treasurer of the Ohio Turnpike Commission, refused "to seal and attest certain revenue bonds and a trust agreement securing them."[76] Relator, the Ohio Turnpike Commission, invoked the original jurisdiction of the supreme court, seeking a writ of mandamus compelling Allen to seal and attest the bonds and trust agreement.[77] Allen filed an answer questioning the constitutionality of the statutes authorizing the issuance of the bonds and "the propriety of certain actions taken by the . . . [Ohio Turnpike Commission] in connection therewith."[78] One of the improprieties alleged in respondent Allen's answer was that the portion of the turnpike to be financed with bond proceeds would "pass through territory that has been zoned and that this will constitute a use in violation of the zoning ordinances."[79] The supreme court summarily dismissed this contention, citing *Doan* and *Gale*.[80]

The most recent Ohio authority on the eminent domain test is the lower court case of *City of Heath v. Licking County Regional Airport Authority*.[81] In *Heath*, the city brought an action to enjoin the airport authority from expanding an existing airport.[82] The authority had the power of eminent domain and could have acquired the land for airport expansion by appropriation, even though the land actually was donated to the authority.[83] The city claimed, *inter alia*, that expansion of the airport was prohibited by a city zoning ordinance. The original airport site was zoned residential and the land donated for the expansion industrial.[84] These zoning restrictions clearly prohibited use of the donated land for airport purposes.[85] The court, relying on *Helsel*, held the airport authority immune from local zoning restrictions under the eminent domain test.[86] Further support was drawn from reliance on *Allen*, *Doan*, and *Gale*.[87]

The line of cases from *Doan* through *Heath* illustrates the complete evolution of the eminent domain test from a rule for resolving conflicts between private land use restrictions and state activities to a rule for resolving conflicts between public zoning restrictions and state activities. In *Brownfield*, the supreme court concluded that judicial resolution of "intergovernmental conflicts" under the eminent domain test is unjustified.[88]

2. *Critical Analysis of the Eminent Domain Test*

The starting point for an analysis of the eminent domain test is the reasoning *Brownfield* offers for refusing to apply this traditional approach to

76. 158 Ohio St. 168, 169, 107 N.E.2d 345, 347 (1952).
77. *Id.*
78. *Id.*
79. *Id.* at 174, 107 N.E.2d at 350.
80. *Id.*
81. 16 Ohio Misc. 69, 237 N.E.2d 173 (Licking County C.P. 1967).
82. *Id.* at 70, 237 N.E.2d at 174.
83. *Id.* at 70–71, 237 N.E.2d at 174–75.
84. *Id.*, 237 N.E.2d at 175.
85. *Id.* at 70, 237 N.E.2d at 175.
86. *Id.* at 77–78, 237 N.E.2d at 177–79.
87. *Id.* at 76–77, 237 N.E.2d at 178–79.
88. 63 Ohio St. 2d 282, 285, 407 N.E.2d 1365, 1367 (1980).

questions of state immunity from local zoning restrictions. In *Brownfield,* the court focused on the evolutionary development of the eminent domain test and concluded the reasoning of *Doan* was inapplicable to "intergovernmental conflicts."[89] In holding restrictive covenants subordinate to the power of eminent domain, the *Doan* court reasoned that the "right to eminent domain rests upon public necessity," which is superior to rights incident to the private ownership of property.[90] *Brownfield* correctly concluded that this public necessity rationale, while a sufficient basis for subordinating private rights to public interests, is an ineffective basis for resolving conflicts between public purposes. The public necessity rationale of *Doan* draws no distinctions between public purposes. Rather, the rationale distinguishes public purposes from private property interests and subordinates certain private interests to the general welfare.[91] "Both the municipality's exercise of its zoning powers and the state's exercise of the power of eminent domain are intended to effectuate public purposes."[92] The real question is which public purpose ought to be deemed superior. The proposition of *Doan* that public necessity is superior to private rights does not answer this question.[93]

Brownfield's analysis of the eminent domain test illustrates a flaw in *Helsel*'s rationale for applying *Doan*'s eminent domain test to conflicts between state activities and local zoning restrictions. The point of departure in *Helsel* was the trial court's examination of the municipal zoning power.[94] *Doan* concluded that private interests in land are subordinate to the power of eminent domain because the power of the state to appropriate land serves public purposes.[95] *Helsel* concluded that the municipal zoning power, though superior to private interests in land, is not superior to the power of eminent domain.[96] The power of eminent domain serves public, not private, purposes, and this characteristic places the power of appropriation in the same category with the zoning power under *Doan*'s distinction between private interests and public purposes.[97] Basing its conclusion on the foregoing analysis, *Helsel* held that the power of eminent domain is superior to the zoning power.[98] The difficulty with *Helsel* is that the trial court's reasoning establishes only that

89. *Id.*

90. 92 Ohio St. 461, 468-69, 112 N.E. 505, 507 (1915).

91. *Id.*

92. Brownfield v. State, 63 Ohio St. 2d 282, 285, 407 N.E.2d 1365, 1367 (1980).

93. The flaw in extending *Doan* to situations involving public zoning ordinances is that such an extension equates the ordinances with private restrictive covenants. In State *ex rel.* Ohio Turnpike Comm'n v. Allen, 158 Ohio St. 168, 107 N.E.2d 345, *cert. denied sub nom.* Balduff v. Ohio Turnpike Comm'n, 344 U.S. 865 (1952), "[t]he court . . . assumed that private development restrictions are the same as city zoning ordinances." Comment, *The Applicability of Zoning Ordinances to Governmental Land Use,* 39 TEX. L. REV. 316, 325 n.62 (1961).

94. 37 Ohio Op. 58, 61-62, 79 N.E.2d 698, 704-05 (Cuyahoga County C.P. 1947).

95. 92 Ohio St. 461, 468-69, 112 N.E. 505, 506-07 (1915).

96. 37 Ohio Op. 58, 62, 79 N.E.2d 698, 705 (Cuyahoga County C.P. 1947).

97. "Zoning ordinances are upheld on the theory that they bear a real and substantial relation to the public welfare . . . , but the presumption is that the use of public property for public purposes is designed to promote the general welfare also." *Id.*

98. *Id.*

public interests are superior to private rights, not that one public interest is superior to another. Thus, *Helsel*'s analysis fails to justify application of the eminent domain test in conflicts between the power to zone and the power to appropriate land.

Though *Helsel*'s central line of reasoning fails to provide a clear basis for preferring the public interests served by eminent domain to those served by local zoning restrictions, other language in the opinion suggests an alternative basis for subordinating the zoning power to the power of appropriation. Prior to announcing its central line of reasoning, the court presented a brief analysis of the power of eminent domain, characterizing it as "an inherent and necessary attribute of sovereignty, existing independently of constitutional provisions."[99] The eminent domain power "antedates constitutions and legislative enactments and exists independently of constitutional sanction or provisions, which are only declaratory of previously existing universal law."[100] Implied in this discussion is the principle that the eminent domain power is superior to the zoning power because the eminent domain power is an "attribute of sovereignty."[101] Even if the eminent domain power is an attribute of sovereignty and the zoning power flows from some other source—the state constitution, for example[102]—the *Helsel* court failed to explain why this distinction should count as a reason for subordinating the zoning power to the power of appropriation.[103] More important, however, is the fact that the zoning and eminent domain powers are both "inherent attributes of the sovereign states"[104] and indistinguishable in terms of their source. Moreover, the reason for the existence of both is that these powers serve public interests—one by taking property and the other by regulating its use.[105]

In addition to the absence of sound theoretical or historical underpinnings for the eminent domain test's distinction between the public powers of zoning and appropriation, the test is overbroad in application.[106] Under the

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99. *Id.* at 61, 79 N.E.2d at 704.

100. *Id.*

101. *Id.*

102. *See* Garcia v. Siffrin Residential Ass'n, 63 Ohio St. 2d 259, 407 N.E.2d 1369 (1980) (zoning power of a municipality is a police power granted by state constitution).

103. By its own language, the *Helsel* court admits that state constitutions are the operative source of the eminent domain power and of sufficient force to limit this "attribute of sovereignty." 37 Ohio Op. 58, 61, 79 N.E.2d 698, 704 (Cuyahoga County C.P. 1947).

104. Scottsdale v. Municipal Court, 90 Ariz. 393, 400, 368 P.2d 637, 641 (1962) (dissenting opinion).

105. Sackman, *The Impact of Zoning and Eminent Domain Upon Each Other*, in INSTITUTE ON PLANNING, ZONING, AND EMINENT DOMAIN 107 (1971).

106. The essence of the overbreadth criticism is that courts apply the eminent domain test before administrative processes that may result in an accommodation between state and local interests are given the opportunity to run their course. In theory, the test can also be criticized as too restrictive in granting immunity. A state activity of substantial worth and urgency might not be supported by the power of eminent domain, in which case local zoning restrictions could effectively prohibit the state from undertaking the activity. This problem arises in theory only. The Ohio General Assembly has enacted eminent domain statutes for a virtually endless variety of state activities. *See* OHIO REV. CODE ANN. §§ 152.21, 306.04, 306.36, 307.08, 308.07, 511.04, 511.24, 517.01, 713.03, 719.01, 719.031, 743.34, 755.08, 759.48, 991.07, 1501.01, 1523.11, 1523.20, 1545.11, 1711.14, 1721.01, 1721.03, 1721.05, 1723.02, 1743.06, 1743.07, 3313.39, 3333.08, 3735.11, 3735.32, 3706.17, 4582.06, 4957.04, 4957.23, 4981.07, 5507.17, 5516.08, 5537.06, 5543.12, 5543.13, 5549.04, 5551.04, 5551.06, 5551.07, 5553.10,

rule of the eminent domain test, local zoning restrictions are subordinated to all state activities supported by the power of eminent domain.[107] The courts do not inquire whether the conflict between local zoning restrictions and a state activity can be resolved by means less drastic than holding the state activity absolutely immune from the zoning power.[108] As *Brownfield* illustrates, the absence of any judicial inquiry into less drastic alternatives for resolving conflicts between the zoning and eminent domain powers is the source of unjustified overbroad applications of the eminent domain test.

In *Brownfield,* there was a real possibility that the state could have operated the proposed halfway house in compliance with local zoning restrictions. The local zoning ordinance permitted the operation of a "lodging-house or hostel conducted for rehabilitation" as a conditional use in areas zoned single-family residential.[109] A conditional use is permitted upon the issuance of a conditional use permit by local zoning authorities.[110] The state did not apply for a conditional use permit in *Brownfield,* but had application been made by the state and had the local zoning authority issued a conditional use permit for the halfway house, the conflict between local zoning restrictions and the halfway house would have disappeared.[111] Because *Brownfield* was remanded for further consideration by the court of appeals on the ground that the state failed to make reasonable efforts to comply with the local zoning ordinance,

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5553.11, 5553.43, 5555.09, 5555.27, 5559.06, 5561.11, 5573.02, 5591.13, 5591.39, 5593.08, 5911.05, 6101.18, 6103.25, 6115.22, 6117.39, 6117.48, 6119.11, 6121.041, and 6151.02 (Page 1980).

The extensive number of agencies and activities supported by the power of eminent domain is a central factor in the overbreadth problem:

> The extensive proliferation of state agencies authorized to condemn further exacerbates the problem. A grant of absolute immunity to all such governmental units would subjugate a community's attempt to coordinate rationally its land-use planning to the land-use decisions of myriad state agencies, often both unresponsive to the desires of the local citizenry and ill-equipped to make comprehensive land-use decisions. If governmental units are assured of absolute immunity, there is no need to comply with the prescribed zoning procedures for obtaining exemptions; thus, adversely affected landowners may be completely denied any opportunity to voice their objections to the location of the institutional facility. Moreover, when eminent domain power automatically immunizes a governmental unit from zoning regulation, there is no institutional incentive to comply with local zoning ordinances and no sanction other than adverse public opinion for irresponsible land-use decisions.

Note, *Governmental Immunity from Local Zoning Ordinances,* 84 HARV. L. REV. 869, 876 (1971).

107. *See* text accompanying notes 31–88 *supra.*

108. *But see* note 68 and text accompanying notes 68–74 *supra.*

109. 63 Ohio St. 2d 282, 285, 407 N.E.2d 1365, 1367 (1980).

110. *See generally* 8A E. MCQUILLIN, MUNICIPAL CORPORATIONS §§ 25.159 & 25.160 (3d ed. 1976). Conditional use permits differ from variances in two respects. First, conditional uses are enumerated in the local zoning ordinance. The enumeration represents the judgment of the local legislative authority that an enumerated form of conditional use may often, but not always, be compatible with the general scheme of zoning for an area. The factual judgment of compatibility is an administrative decision. The decision to grant a variance is also administrative, but a variance may be granted for a use not specifically enumerated in the local zoning ordinance.

Second, the standard applied in the administrative decision to grant a conditional use is not as strict as the standard for variances. Since variances are granted for uses that clearly depart from the local zoning scheme, a showing of unnecessary hardship is required. In other words, enforcement of the existing zoning scheme must generate a hardship that can be relieved only by varying the local zoning scheme. By contrast, a conditional use permit is granted on the lesser showing of substantial public service or convenience from the conditional use. This lesser showing is justified because the legislature has narrowed the discretion of the administrative authority by enumerating conditional uses in the zoning ordinance. *Id.*

111. 63 Ohio St. 2d 282, 285, 407 N.E.2d 1365, 1367 (1980).

resolution of the conflict in the case may yet occur by the issuance of a conditional use permit.[112] Had *Brownfield* been decided by the supreme court under the eminent domain test, the court would not have inquired into the authority of the city to issue a conditional use permit because the inquiry would have been totally unnecessary. Operation of the halfway house in *Brownfield* is supported by the power of eminent domain,[113] and the supreme court, on the basis of this fact, would presumably have held the facility immune from local zoning restrictions.

Judicial resolution of conflicts under the eminent domain test prior to the exhaustion of less drastic nonjudicial alternatives forecloses the possibility of nonjudicial conflict resolution. A rule requiring the exhaustion of administrative alternatives before resort to the courts enhances the possibility that the parties to a conflict will reach an accommodation that serves the public interests underlying both the zoning power and the state's activity.[114] For example, were the state to apply for a conditional use permit for its proposed halfway house, the administrative process for granting the permit would serve as a vehicle for accommodation between the state and local zoning authorities. The exchange of accurate information and ensuing discussions between the parties might eliminate local misconceptions regarding the nature of the state's proposed use, clarify issues and concerns on both sides, and reveal fertile ground for compromise that would otherwise remain uncultivated.[115] Total compromise by one party might occur if the zoning authority concludes its concerns are totally unfounded and issues a conditional use permit or the state concludes the concerns of the zoning authority are substantial and legitimate and decides not to pursue its proposed use at the controversial site. The more likely possibility is that both the state and the local zoning authority would compromise on some concerns. The zoning authority could, for example, issue a conditional use permit with one or more attached conditions.[116]

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112. *See* text accompanying notes 228–34 *infra*.

113. The Ohio Department of Mental Health and Mental Retardation was the state agency responsible for the proposed halfway house. Section 5121.17, Ohio Revised Code, vested the Department with the following powers of eminent domain:

> When it is necessary for a state benevolent, correctional, or penal institution to acquire any real estate, right of way or easement in real estate in order to accomplish the purposes for which it was organized or is being conducted, and the department of mental health and mental retardation or the department of rehabilitation and correction is unable to agree with the owner of such property upon the price to be paid therefor, such property may be appropriated in the manner provided for the appropriation of property for other state purposes.

OHIO REV. CODE ANN. § 5121.17 (Page Supp. 1980) (current version at 1980 Ohio Laws, H.B. No. 900 (to be codified in OHIO REV. CODE ANN. § 5119.37)).

114. In addition, ignoring established administrative procedures undermines public confidence in the zoning process. Note, *Governmental Immunity From Local Zoning Ordinances*, 84 HARV. L. REV. 869, 876 n.34 (1971).

115. In *Brownfield*, for example, there was disagreement between the parties as to the number of residents who would live in the halfway house at any given time. The court noted that "the halfway house will serve as a home for no more than five residents," 63 Ohio St. 2d 282, 282, 407 N.E.2d 1365, 1365 (1980), but appellants presented convincing evidence that the residential capacity at the facility was twice that size. Brief of Appellants at 3, 12–13, Brownfield v. State, 63 Ohio St. 2d 282, 407 N.E.2d 1365 (1980).

116. *See* 8A E. MCQUILLIN, MUNICIPAL CORPORATIONS § 25.160 (3d ed. 1976).

The conditions would require the state to modify certain aspects of its proposed use and, upon its effecting the modifications, the state's use would be permitted under the local zoning ordinance.[117] If the conditions imposed by the local zoning authority were reasonable and did not require the state to modify its proposed use in ways that would severely compromise the state's original objectives, the state would likely make the modifications to accommodate local concerns.

If a compromise resolution of a conflict between local zoning restrictions and a proposed state activity is reached during the administrative process for the issuance of a conditional use permit, the courts need not confront the issue. Moreover, the resolution stipulated in the preceeding paragraph is a true accommodation. Local zoning interests are served by the state's modification of the proposed use, and the state's interests are served because the modified use is permitted under the local zoning scheme. By contrast, a judicial resolution of the conflict under the eminent domain test is an all-or-nothing proposition that completely serves one set of public interests at the expense of disserving the other.[118] For example, if the state's proposed use is supported by the power of eminent domain, the courts will hold that use immune from local zoning restrictions and the state is under no obligation to accommodate the interests served by the zoning power.[119] By contrast, if the state's proposed use is not supported by the power of eminent domain, the courts will hold the use subject to local zoning restrictions and the local zoning authority will have no incentive to accommodate the public interests served by the state activity.[120] Either result represents an unjustified overbroad application of the eminent domain test if administrative remedies that could lead to accommodation of both sets of interests have not been exhausted. The eminent domain test does not require the courts to insist upon exhaustion of administrative remedies. Instead, the only inquiry is whether the state's proposed activity is supported by the power of appropriation.

The apparently obvious solution to overbroad applications of the eminent domain test is for the courts to refuse to resolve conflicts under the eminent domain test prior to the exhaustion of administrative remedies. An exhaustion of administrative remedies requirement is by no means foreign to the law of zoning,[121] and nothing prevents the courts from imposing an exhaustion re-

117. In *Brownfield,* the city might have issued a conditional use permit subject to the condition that the number of residents in the halfway house not exceed five. *See* note 115 *supra.*

118. *See* State *ex rel.* Ohio Turnpike Comm'n v. Allen, 158 Ohio St. 168, 107 N.E.2d 345 (1952) (state turnpike prevails over local zoning interests); City of Heath v. Licking County Regional Airport Auth., 16 Ohio Misc. 69, 237 N.E.2d 173 (Licking County C.P. 1967) (county airport expansion prevails over local zoning interests); State *ex rel.* Helsel v. Board of County Comm'rs, 37 Ohio Op. 58, 79 N.E.2d 698 (Cuyahoga County C.P. 1947) (county airport operation prevails over local zoning interests).

119. *See* note 68 and text accompanying notes 68–74 *supra.*

120. This is the clear implication of the eminent domain test, but Ohio courts have never confronted a case in which there was a conflict between a state activity and local zoning restrictions and the activity was not supported by the power of eminent domain. For an explanation of this phenomenon, see note 106 *supra.*

121. "It is a general rule that a party seeking relief under the zoning laws must first pursue and exhaust the administrative remedy available to him before bringing an action or proceeding for judicial relief, unless the administrative remedy is inadequate or nonexistent." 8A E. MCQUILLIN, MUNICIPAL CORPORATIONS § 25.283 (3d ed. 1976) (footnotes omitted).

quirement under the eminent domain test.[122] On the surface, the imposition of an exhaustion requirement seems to accomplish the goal of eliminating overbroad applications of the eminent domain test by forcing the parties to utilize the administrative processes that may lead to an accommodation of state and local interests. For example, under an exhaustion requirement the state would be forced to apply for a conditional use permit if its activity that otherwise violates local zoning restrictions might qualify as a conditional use.[123] A more careful analysis of the eminent domain test reveals that, even with the imposition of a requirement for the exhaustion of administrative remedies, the test would remain overbroad in application.[124] The courts would continue to apply the test in circumstances in which an accommodation of state and local interests might otherwise be achieved because judicial outcomes under the eminent domain test are highly predictable and one of the parties would have a significant incentive to hold out for a judicial resolution of the conflict.

Judicial outcomes under the eminent domain test are highly predictable because the test is applied mechanically and the essential judicial inquiry is simple and clear cut. Under the test, the only inquiry for the courts is whether the state activity is supported by the power of eminent domain.[125] If the state activity is supported by the power of appropriation, the activity is immune from local zoning restrictions;[126] if the state activity is not supported by the power of eminent domain, the activity is subject to local zoning restrictions.[127] In either case, the inquiry is not complicated and the judicial outcome can be predicted with relative ease.[128] Ordinarily, attributes of simplicity and predictability are desirable characteristics for a judicial test because they give a clear indication of what behavior the courts will find acceptable and unacceptable. Unfortunately, the predictability of outcomes under the eminent domain test acts as a disincentive to nonjudicial resolutions of conflicts through an accommodation of state and local interests.

As a general rule, the state will prefer a judicial resolution of a conflict under the eminent domain test when its proposed activity is supported by the power of eminent domain. If the eminent domain power is present, the state can be confident of a favorable judicial outcome and there is no incentive for the state to accommodate the interests served by local zoning restrictions.[129]

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122. An exhaustion of administrative remedies requirement was imposed by the court in *Brownfield* as a matter of judicial discretion. *See* text accompanying notes 228–50 *infra*.

123. *See, e.g.*, text accompanying notes 228–34 *infra*.

124. Even if an exhaustion of administrative remedies requirement could be effectively imposed under the eminent domain test, the test should still be rejected because its distinction between the public interests served by the zoning and eminent domain powers is unjustified. *See* text accompanying notes 89–105 *supra*.

125. *But see* note 68 and accompanying text *supra*.

126. *See* State *ex rel.* Ohio Turnpike Comm'n v. Allen, 158 Ohio St. 168, 107 N.E.2d 345, *cert. denied sub nom.* Balduff v. Ohio Turnpike Comm'n, 344 U.S. 865 (1952); City of Heath v. Licking County Regional Airport Auth., 16 Ohio Misc. 69, 237 N.E.2d 173 (Licking County C.P. 1967); State *ex rel.* Helsel v. Board of County Comm'rs, 37 Ohio Op. 58, 79 N.E.2d 698 (Cuyahoga County C.P. 1947).

127. *See* note 120 *supra*.

128. The courts may, of course, reject a test after applying it over a considerable period of time. *See* Brownfield v. State, 63 Ohio St. 2d 282, 284–85, 407 N.E.2d 1365, 1367 (1980) (rejecting Ohio's traditional eminent domain test).

129. *See* authorities cited in note 118 *supra*.

By contrast, the local zoning authority will prefer a judicial resolution under the eminent domain test when the state's activity is not supported by the power of eminent domain because, when the power is absent, the eminent domain test requires the state to comply with local zoning restrictions.[130] Therefore, when the eminent domain power is not present to support the state's activity, the local zoning authority will have no incentive to accommodate the interests served by the state's activity. In either case, one of the parties to the conflict is not likely to engage in serious attempts toward accommodation, even under an exhaustion of administrative remedies requirement, because that party can be reasonably certain that its interests will be fully vindicated by a judicial resolution of the conflict.[131]

The principle flaws in the eminent domain test are the absence of a clear theoretical or historical justification for distinguishing between the powers of zoning and eminent domain[132] and the inherent potential for overbroad application of the test that circumvents accommodations of both state and local interests.[133] These flaws are sufficiently serious to justify an exploration of alternative rules for resolving conflicts between local zoning restrictions and state activities. One alternative rule was suggested by plaintiff-appellants in *Brownfield*.

B. *The Governmental-Proprietary Use Distinction*

Plaintiff-appellants in *Brownfield* argued that the conflict between the state's proposed halfway house and the local zoning ordinance should be resolved on the basis of the governmental-proprietary use distinction.[134] "Under this test, uses of a governmental (essential) nature are immune from local zoning ordinances, while uses of a proprietary (permissive) nature are not."[135] Plaintiff-appellants' position was that the proposed halfway house, though an authorized state activity, was not an undertaking essential to the general public welfare.[136] Consequently, the halfway house should not have been immune from local zoning restrictions.[137]

1. *Nature of the Governmental-Proprietary Use Distinction*

Though the Ohio courts have never subscribed to the governmental-proprietary use distinction in the zoning context,[138] a number of jurisdictions

130. *See* note 120 *supra*.
131. *See* note 106 *supra*.
132. *See* text accompanying notes 89–105 *supra*.
133. *See* text accompanying notes 106–31 *supra*.
134. 63 Ohio St. 2d 282, 286, 407 N.E.2d 1365, 1368 (1980).
135. *Id.*
136. Brief of Appellants at 25–27, Brownfield v. State, 63 Ohio St. 2d 282, 407 N.E.2d 1365 (1980).
137. *Id.*
138. The distinction has its origins in the doctrines of municipal tort liability and has been applied by the Ohio courts, among others, in this context. *See* Seasongood, *Municipal Corporations: Objections to the Governmental or Proprietary Test*, 22 VA. L. REV. 910 (1936). *See generally* 3 FARRELL, THE LAW GOVERNING MUNICIPAL CORPORATIONS IN OHIO §§ 15.1–15.2 (11th ed. 1962).

rely on the distinction to resolve conflicts between local zoning restrictions and state activities.[139] Two of the leading cases from other jurisdictions are *City of Scottsdale v. Municipal Court*[140] and *Nehrbas v. Village of Lloyd Harbor*.[141] These cases clarify the nature of the governmental-proprietary use distinction. The use of land is "governmental," as opposed to "proprietary," when the use is a response to matters of public necessity.[142] Public necessity, in turn, incorporates two notions. First, the public in general, and not some isolated fraction thereof, must benefit from the state activity. Second, the activity must address a true need, not a matter of mere convenience.[143]

In *City of Scottsdale v. Municipal Court*,[144] the Supreme Court of Arizona held Scottsdale's operation of a municipal sewage plant immune from the city of Tempe's zoning ordinance under the governmental-proprietary use distinction. Scottsdale sought to expand its existing sewage plant onto twenty acres of land adjoining the existing site.[145] Neither the existing plant nor the expansion site were located in Scottsdale.[146] Two years after Scottsdale's purchase of the expansion site, Tempe annexed a section of land embracing both the existing facility and the expansion site and zoned the area residential.[147] Scottsdale's application for a use permit was denied by Tempe, but Scottsdale, believing itself immune from Tempe's zoning ordinance, commenced construction on the twenty acre site.[148] Tempe cited Scottsdale in municipal court for violating Tempe's zoning ordinance, and Scottsdale brought an original action in the Supreme Court of Arizona to prohibit the municipal court of Tempe from enforcing the zoning ordinance against Scottsdale's construction.[149] Tempe, relying on the governmental-proprietary

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139. *See* Note, *Municipal Power to Regulate Building Construction and Land Use by Other State Agencies*, 49 MINN. L. REV. 284, 295 n.41 (1964).

140. 90 Ariz. 393, 368 P.2d 637 (1962).

141. 2 N.Y.2d 190, 140 N.E.2d 241, 159 N.Y.S.2d 145 (1957).

142. *See* text accompanying notes 144–66 *infra*.

143. These components are apparent in the following general formulations of the governmental-proprietary use distinction: "The unit performs a proprietary function if the act is permissive in nature, *i.e.*, if the particular political unit has the power, but not the duty, to perform a specific function." Note, *Governmental Immunity from Local Zoning Ordinances*, 84 HARV. L. REV. 869, 870 (1971) (footnotes omitted); "Governmental functions are those required by legislative mandate and involving a direct benefit to the general public, while an activity conferring private advantages pursuant to permissive legislation is proprietary." Note, *Municipal Power to Regulate Building Construction and Land Use by Other State Agencies*, 49 MINN. L. REV. 284, 295–96 (1964) (footnotes omitted);

> The criteria used in determining whether an activity is governmental or proprietary are: (1) a municipality performs a governmental function when doing acts required by legislative mandate whereas it acts in a proprietary capacity when performing by legislative permission, and, (2) a municipal function is governmental when the acts involves [sic] benefit to the general public as distinguished from acts which involve private benefits and in which public benefit is indirect.

Comment, *The Applicability of Zoning Ordinances to Governmental Land Use*, 39 TEX. L. REV. 316, 318 (1961) (footnotes omitted).

144. 90 Ariz. 393, 368 P.2d 637 (1962).

145. *Id.* at 395, 368 P.2d at 638.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

use distinction, argued that the sewage plant was a proprietary activity and therefore should be subject to local zoning restrictions.[150]

The reasoning of the Supreme Court of Arizona in *Scottsdale* is instructive in delineating the determinative characteristics of a "governmental" use. In holding Scottsdale's use immune from Tempe's zoning ordinance, the court accepted the governmental-proprietary use distinction but held that operation of a sewage plant is a governmental function. The court began its analysis by observing that prior cases classified garbage collection as a governmental use.[151] This classification was grounded on the notion that "the preservation of the public health is one of the duties that devolves upon the state as a sovereignty."[152] The court then concluded that the operation of a sewage plant is a governmental use because "sewage disposal is not merely desirable, it is a stark necessity."[153] Sewage disposal, like garbage collection, was classified as a governmental use on the grounds that a matter of general public necessity—the preservation of public health—was served by the activity.

Nehrbas v. Village of Lloyd Harbor[154] also relies on a public necessity criterion to distinguish governmental and proprietary uses. In *Nehrbas*, the defendant village purchased a two-acre parcel containing a large barn. The village proposed to use the barn for public offices and as a garage for certain village vehicles, including two garbage trucks.[155] Plaintiffs, owners of a nearby residential parcel, initiated an action to enjoin the village from using the barn and land for nonresidential purposes.[156] The defendant's barn was located in a district zoned for residential purposes only.[157]

The *Nehrbas* court applied the governmental-proprietary use distinction on the grounds that "a municipality must have the power to select the site of buildings or other structures for the performance of its governmental duties. Accordingly, it necessarily follows, a village is not subject to zoning restrictions in the performance of its governmental, as distinguished from its corporate or proprietary, functions."[158] Plaintiffs contended that use of the barn as a garage for police cars, highway department trucks, and garbage trucks was not a governmental use.[159] In answering this contention, the court admitted that the governmental-proprietary use distinction is not easily applied because "no all embracing formula or definition is possible."[160] Nevertheless, the court approved the garaging of police cars and highway equipment at the

150. *Id.* at 397–98, 368 P.2d at 639.
151. *Id.* at 398, 368 P.2d at 640.
152. *Id.*
153. *Id.*
154. 2 N.Y.2d 190, 140 N.E.2d 241, 159 N.Y.S.2d 145 (1957).
155. *Id.* at 192, 140 N.E.2d at 242, 159 N.Y.S.2d at 146.
156. *Id.* at 192–93, 140 N.E.2d at 242, 159 N.Y.S.2d at 146–47.
157. *Id.* at 193, 140 N.E.2d at 242, 159 N.Y.S.2d at 147.
158. *Id.*
159. *Id.* at 194, 140 N.E.2d at 243, 159 N.Y.S.2d at 148.
160. *Id.*

barn because the funishing of a police force and maintenance of roads and highways are clearly governmental functions.[161] The garaging of garbage trucks presented a more difficult question, but the court concluded garbage removal was also a governmental function because "the continued well-being and health of the community . . . demand that garbage be removed."[162] In the words of the court, "necessity creates the duty, and it is incumbent upon the municipality to assure . . . [the] collection and disposal" of garbage to preserve the public health.[163]

Scottsdale and *Nehrbas* highlight the central components of the public necessity criteria used to distinguish governmental and proprietary uses.[164] The cases classify garbage collection and sewage disposal as governmental uses because these two activities preserve the public health.[165] Preservation of the public health is a "duty" of government[166]—not a matter of mere convenience—and the general public benefits from government's fulfillment of this duty. Since garbage collection and sewage disposal meet these two components of the public necessity criteria, the activities are classified as governmental uses immune from local zoning restrictions. This result appears justified in *Scottsdale* and *Nehrbas,* but a more thorough analysis of the governmental-proprietary use distinction casts serious doubt upon its usefulness as a tool for resolving conflicts between local zoning restrictions and state activities.

2. *Critical Analysis of the Governmental-Proprietary Use Distinction*

Brownfield rejects the governmental-proprietary use distinction for reasons that are not completely clear. After citing a case and several commentaries criticizing the distinction,[167] the court concluded, "Because of its difficulty of application and tenuous nexus with the realities of governmental activity, we believe that the governmental-proprietary distinction serves no useful purpose in the field of municipal zoning."[168] The crux of this criticism appears to be that the criteria for applying the distinction are vague[169] and an inappropriate basis for determining whether state activities are immune from local zoning restrictions.[170]

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161. *Id.*

162. *Id.*

163. *Id.* at 194–95, 140 N.E.2d at 243, 159 N.Y.S.2d at 148.

164. *See* note 143 *supra* and text accompanying.

165. *See* text accompanying notes 152–53 and 163 *supra.*

166. Nehrbas v. Village of Lloyd Harbor, 2 N.Y.2d 190, 194, 140 N.E.2d 241, 243, 159 N.Y.S.2d 145, 148 (1957).

167. Brownfield v. State, 63 Ohio St. 2d 282, 286, 407 N.E.2d 1365, 1368 (1980) (citing Township of Worthington v. Village of Ridgewood, 26 N.J. 578, 584, 141 A.2d 308, 311 (1958); Seasongood, *Municipal Corporations: Objections to the Governmental or Proprietary Test,* 22 VA. L. REV. 910 (1936); Note, *Governmental Immunity from Local Zoning Ordinances,* 84 HARV. L. REV. 869 (1971); Comment, *The Applicability of Zoning Ordinances to Governmental Land Use,* 39 TEX. L. REV. 316 (1961); Recent Decisions, 15 N.Y.U.L. REV. 499 (1937)).

168. Brownfield v. State, 63 Ohio St. 2d 282, 286, 407 N.E.2d 1365, 1368 (1980).

169. *See* text accompanying notes 171–76 *infra.*

170. *See* text accompanying notes 183–86 *infra.*

The principle criticism of the governmental-proprietary use distinction is that "its vagueness makes it virtually impossible to apply."[171] One noted commentator has denounced the test because "no satisfactory basis for solving the problem whether the activity falls into one class or other has been evolved."[172] This vagueness is illustrated by the classifying criteria used in *Scottsdale* and *Nehrbas*. Under these cases, a use is governmental if there is, in the judgment of the court, sufficient "public necessity" supporting the use.[173] What is a necessity in the view of one court may not, however, be a necessity in the view of another.

Even when the components of the public necessity criteria are isolated, the criteria remains vague and application of the governmental-proprietary use distinction leads to unpredictable and confusing results.[174] Application of the governmental-proprietary use distinction has resulted in different classifications of the same use by various jurisdictions and, in some instances, different classifications of the same or very similar uses within a single jurisdiction.[175] Even when the classification of a use appears firmly established in a given jurisdiction, the classification may change over time.[176] As a general matter, the lack of even marginally predictable results caused by the vagueness of the public necessity criteria puts both the state and local zoning authorities in an extremely difficult position. In a regime of uncertainty, policymakers are left to formulate policy on the basis of unsatisfactory guesses, not reasoned judgments.

The governmental-proprietary use distinction suffers from infirmities other than its reliance on vague criteria. In particular, the distinction's rule of immunity is unjustifiably overbroad in substance and application, and zoning interests are not considered in judicial resolutions of the immunity question.

Under the governmental-proprietary use distinction, immunity from local zoning restrictions for governmental uses is premised on the view that the state "must have the power to select the site of buildings or other structures for the performance of its governmental duties."[177] Governmental uses of land support the performance of governmental duties, and the rule of immunity for such uses is premised on the assumption that duties cannot be performed effectively if governmental uses are encumbered by local zoning restrictions. However, local zoning restrictions do not always conflict with the

171. Note, *Municipal Power to Regulate Building Construction and Land Use by Other State Agencies*, 49 MINN. L. REV. 284, 296 (1964).

172. Seasongood, *Municipal Corporations: Objections to the Government or Proprietary Test*, 22 VA. L. REV. 910, 938 (1936).

173. *See* text accompanying notes 138–66 *supra*.

174. Moreover, these results are unjustified because the narrow focus of the public necessity criterion is not supported by principle. *See* text accompanying notes 183–86 *infra*. *Compare* text accompanying notes 294–304 *infra*, offering justification for the vagueness of the balancing test.

175. Comment, *The Applicability of Zoning Ordinances to Governmental Land Use*, 39 TEX. L. REV. 316, 319 (1964).

176. *Id.*

177. Nehrbas v. Village of Lloyd Harbor, 2 N.Y.2d 190, 193, 140 N.E.2d 241, 242, 159 N.Y.S.2d 145, 147 (1957).

effective performance of governmental duties, and when no conflict exists there is no justification for a rule extending immunity to all governmental uses. The rule is overbroad in substance when compliance with local zoning restrictions does not compromise the effective performance of governmental functions.

Compliance with local zoning restrictions does not compromise the state's ability to perform governmental functions when several sites are available for a governmental use and each site enables the state to perform its duties effectively. If the sites are equally well-suited to the governmental use or differences between the sites are marginal, it is of little or no consequence to the state if local zoning restrictions prohibit the governmental use on one or several of the sites. The remaining sites serve the state's interests equally well, and, under these circumstances, the necessity for undertaking a governmental use does not justify immunity from local zoning restrictions.

The governmental-proprietary use distinction is not only overbroad in substance; it is also overbroad in application. In this respect, the deficiency of the governmental-proprietary use distinction mirrors a deficiency in the eminent domain test.[178] As with the eminent domain test, there is no requirement under the governmental-proprietary use distinction that administrative remedies be exhausted before the courts will resolve a conflict between local zoning restrictions and a state activity.[179] Administrative processes in the zoning law facilitate negotiation and compromise and include mechanisms for accommodation of both state and local interests.[180] Judicial resolution of a conflict under the governmental-proprietary use distinction stands in stark contrast to accommodations that may be achieved by an administrative resolution. The ultimate judicial resolution of a conflict is an all-or-nothing proposition. If the state's proposed use is classified as governmental, the use is immune from local zoning restrictions and the interests served by the zoning power are completely disserved; if the state's proposed use is classified as proprietary, the use is subject to local zoning restrictions and the state's interests are disserved.[181] Neither result can be justified if the possibility of an accommodation serving both state and local interests is ignored by the courts. In applying the governmental-proprietary use distinction, the courts ignore this possibility by their failure to insist that administrative processes for resolution of the conflict be exhausted prior to a judicial resolution of the dispute.[182]

The final, and perhaps most fundamental, infirmity of the governmental-proprietary use distinction is its narrow focus on the public interests served

178. *See* text accompanying notes 106–20 *supra*.

179. The cases simply do not impose such a requirement. *See, e.g.*, City of Scottsdale v. Municipal Court, 90 Ariz. 393, 368 P.2d 637 (1962); Nehrbas v. Village of Lloyd Harbor, 2 N.Y.2d 190, 140 N.E.2d 241, 159 N.Y.S.2d 145 (1957).

180. *See* text accompanying notes 114–19 *supra*.

181. Brownfield v. State, 63 Ohio St. 2d 282, 286, 907 N.E.2d 1365, 1368 (1980).

182. *See* note 179 *supra* and accompanying text.

by state activities. Under the governmental-proprietary use distinction, the intensity of the public interests served by a state activity is the only factor upon which the courts rely to resolve a conflict between the state's activity and local zoning restrictions.[183] If the intensity of the interests served by the state's activity rises to the level of public necessity, the activity is classified as a governmental use immune from local zoning restrictions.[184] If the interests served by the activity do not qualify as a matter of public necessity, the activity is classified as a proprietary use subject to local zoning restrictions.[185] Zoning interests play no role in the distinction between governmental and proprietary uses.

In ignoring zoning interests and focusing exclusively on the interests served by state activities, the governmental-proprietary use distinction draws an implicit distinction between two sets of public interests. In the determination of immunity from local zoning restrictions, the public interests served by the zoning power are subordinated to the public interests served by state activities. Intuitively, this is an unacceptable position. If the intensity of the public interests served by a state activity is relevant to the determination of immunity, the intensity of all public interests implicated in a conflict between the state activity and local zoning restrictions should be considered by the courts. By foreclosing consideration of zoning interests, the governmental-proprietary use distinction runs contrary to this intuitive notion. Moreover, the test offers no principled basis for distinguishing the public interests served by zoning from the public interests served by other state activities. The earlier analysis of the eminent domain test suggests there is no principled basis for distinguishing and subordinating zoning interests to other public interests of the state.[186] State interests and the interests served by local zoning restrictions are both grounded in the concept of the public welfare, which is best served by a decision-making process that weighs all public interests.

The absence of a justification for excluding zoning interests from consideration in the judicial decision to grant immunity to a state activity, coupled with problems of overbreadth and vagueness, support *Brownfield*'s rejection of the governmental-proprietary use distinction as a means for resolving conflicts between state activities and local zoning restrictions. *Brownfield*'s balancing test rectifies these infirmities of the governmental-proprietary use distinction and similar flaws in the eminent domain test.

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183. *See, e.g.*, City of Scottsdale v. Municipal Court, 90 Ariz. 393, 368 P.2d 637 (1962); Nehrbas v. Village of Lloyd Harbor, 2 N.Y.2d 190, 140 N.E.2d 241, 159 N.Y.S.2d 145 (1957); Note, *Governmental Immunity from Local Zoning Ordinances*, 84 HARV. L. REV. 869, 870–71 (1971).

184. *See* note 143 *supra* and accompanying text.

185. *Id.*

186. *See* text accompanying notes 89–105 *supra*.

III. NATURE OF THE *BROWNFIELD* BALANCING TEST

Under the test adopted in *Brownfield,* conflicts between state activities and local zoning restrictions are resolved by weighing the public interests served by the proposed state activity against the public interests served by the enforcement of local zoning restrictions.[187] This balancing of government interests rests on the principle that

> the correct approach in these cases where conflicting interests of governmental entities appear would be in each instance to weigh the general public purposes to be served by the exercise of each power, and to resolve the impasse in favor of that power which will serve the needs of the greater number of our citizens.[188]

This statement of principle indicates dissatisfaction with the eminent domain test and the governmental-proprietary use distinction, both of which fail to account for the public interests served by zoning.

A. *Interests Considered in Judicial Balancing*

The court in *Brownfield* set forth the following factors as relevant in the balancing approach:

> Where compliance with zoning regulation would frustrate or significantly hinder the public purpose underlying the acquisition of property, a court should consider, *inter alia,* the essential nature of the government-owned facility, the impact of the facility upon surrounding property, and the alternative locations available for the facility, in determining whether the proposed use should be immune from zoning laws.[189]

The court drew these factors from *Town of Oronoco v. City of Rochester,*[190] a Minnesota decision applying a balancing test.

In *Oronoco,* the city of Rochester undertook efforts to replace its existing waste disposal facilities with a sanitary landfill. Site selection was begun in 1968, and after consultation with the state pollution control agency, Rochester obtained an option to purchase a 252 acre farm. The farm was located north of the city in the township of Oronoco. The option to purchase was obtained with an intent on the part of the city to conduct tests to determine whether the site would be suitable for use as a landfill.[191] Oronoco sought to enjoin the undertaking because under the Oronoco zoning ordinance and a county zoning ordinance the land was zoned for agricultural use.[192]

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187. 63 Ohio St. 2d 282, 285, 407 N.E.2d 1365, 1367 (1980).

188. *Id.* Fortunately, the court lends substance to this principle by specifying the considerations relevant to the balancing decision. *See* text accompanying notes 189–214 *infra.* Without the specification of these considerations, the court's language rings of political decision making and vote counting.

189. 63 Ohio St. 2d 282, 286–87, 407 N.E.2d 1365, 1368 (1980).

190. 293 Minn. 468, 197 N.W.2d 426 (1972).

191. *Id.* at 468–69, 197 N.W.2d at 427.

192. *Id.* at 469, 197 N.W.2d at 427.

Pursuant to Oronoco's action, the trial court granted a temporary injunction that required the city of Rochester to notify the court prior to the beginning of construction.[193] The Rochester City Council appointed a technical committee to select sites for the proposed landfill. The committee recommended five locations to the mayor, including the Oronoco site. The mayor appointed a second site selection committee, which reported a list of eight possible sites in order of preference. The Oronoco site was ranked second, but the location ranked first subsequently became unavailable due to pollution control difficulties.[194]

In February 1970 the state pollution control agency issued a permit for the construction and operation of a sanitary landfill at the Oronoco site. Under the permit, the pollution control agency's approval for construction and operation of the landfill was subject to several conditions designed to ensure proper pollution control at the landfill.[195] In March 1970 Rochester applied for a special exception permit from the County Planning Advisory Commission to operate its landfill at the Oronoco site. The application for the special exception permit was submitted under the provisions of a recent amendment to the county zoning ordinance. The amendment authorized the County Planning Advisory Commission to issue special exception permits for the operation of landfills in areas where the zoning ordinance would otherwise prohibit landfills. The permit was refused, and the County Board of Adjustment affirmed the refusal.[196] Rochester's appeal was consolidated with the earlier action brought by Oronoco to enjoin construction, and landowners in the area were permitted to intervene. The trial court, after a hearing, denied injunctive relief and ordered the County Planning Advisory Commission to issue a special exception permit.[197] The county and individual intervenors appealed to the Supreme Court of Minnesota.

The supreme court treated the case as raising two distinct issues of governmental immunity from local zoning restrictions. The issues were whether the Oronoco township zoning ordinance was applicable to Rochester's landfill and whether the county zoning ordinance was applicable to the landfill.[198] The township ordinance was held inapplicable to Rochester's landfill under the eminent domain test.[199] By contrast, with respect to the issue of the applicability of the county zoning ordinance, the court affirmed the trial court's decision after resorting to a test that balanced two factors.[200]

193. *Id.*
194. *Id.*
195. *Id.* at 469–70, 197 N.W.2d at 427–28.
196. *Id.* at 470, 197 N.W.2d at 428.
197. *Id.*
198. *Id.*
199. *Id.* The *Oronoco* court gave no satisfactory explanation for its selective use of the eminent domain test against only the township zoning ordinance. By contrast, *Brownfield*'s balancing test appears applicable regardless of the governmental unit imposing the zoning restrictions or proposing the land use. Board of Educ. v. Puck, No. 999,280, slip op. at 5 (8th Judicial Dist. Ct. App. Ohio Nov. 20, 1980).
200. 293 Minn. 468, 471–72, 197 N.W.2d 426, 429–30 (1972).

First, the court examined the need for the new landfill, noting that the present landfill site utilized by the city had insufficient cover material and constituted a pollution threat to a nearby river.[201] Balanced against this consideration were the various environmental threats presented by use of the Oronoco site. With respect to these threats, the court was satisfied that the approval of the state pollution control agency, together with the duty of the agency to regulate the future operation of the landfill, was adequate to prevent any environmental hazards that site development would create.[202]

The rationale and holding of *Oronoco* clarify the meaning of the *Brownfield* court's language regarding two of the factors involved in the *Brownfield* balancing test. The "essential nature of the government-owned facility"[203] refers to the need for the facility, not to its intrinsic character. In *Oronoco,* the development of the new landfill site allowed Rochester to terminate use of an existing landfill that created environmental hazards.[204] The character of the government activity is to be considered in the evaluation of the "impact of the facility upon surrounding property."[205] In *Oronoco,* that impact was claimed to be environmental hazards. The fact that the *Oronoco* court found state regulation sufficient to mitigate that impact[206] suggests the impact must be assessed realistically in light of relevant mitigating circumstances and external controls.

While the rationale and holding of *Oronoco* clarify the content and meaning of the first two balancing factors identified in *Brownfield, Oronoco* provides less guidance regarding the content of the third balancing element identified by the *Brownfield* court—alternative locations for the proposed use. Given the facts of *Oronoco, Brownfield*'s requirement that "a court should consider . . . the alternative locations available for the facility"[207] could have one of two meanings. First, this language could mean a court should explore whether alternative sites are available that effectively serve the proposed use and minimize any disservice of the interests underlying local zoning restrictions. A second interpretation is that *Brownfield* requires only that the court be convinced that the state has conducted a good faith evaluation of alternative sites before concluding that the proposed site is the location best suited to the state's needs. The second interpretation is supported by *Oronoco*'s lengthy discussion of the site selection efforts undertaken by Rochester[208] but makes little sense in light of *Brownfield*'s independent requirement "that the condemning or land-owning authority must make a reasonable attempt to comply with the zoning restrictions of the affected political subdivision" prior

201. *Id.* at 472, 197 N.W.2d at 429.
202. *Id.*
203. Brownfield v. State, 63 Ohio St. 2d 282, 286, 407 N.W.2d 1365, 1368 (1980).
204. 293 Minn. 468, 472, 197 N.W.2d 426, 429 (1972).
205. Brownfield v. State, 63 Ohio St. 2d 282, 286, 407 N.E.2d 1365, 1368 (1980).
206. 293 Minn. 468, 472, 197 N.W.2d 426, 429 (1972).
207. 63 Ohio St. 2d 282, 286–87, 407 N.E.2d 1365, 1368 (1980).
208. 293 Minn. 468, 468–70, 197 N.W.2d 426, 427–28 (1972).

to a judicial resolution of the conflict under the balancing test.[209] Moreover, a careful reading of the language in *Brownfield* outlining the factors considered in balancing indicates that the "court," not the "state," "should consider . . . the alternative locations available for the facility."[210] This choice of language belies any suggestion that the balancing inquiry is whether the state undertook a good faith evaluation of alternative sites and confirms the interpretation requiring the court to conduct a de novo exploration of siting alternatives. The extent of this de novo review of alternative sites is an open question. In *Oronoco,* plaintiffs alleged only that "a different site should be selected" but failed to specify what alternative sites were available for Rochester's landfill.[211] The only concrete alternative before the court was the present landfill site that was unsuitable for continued use due to environmental hazards.[212]

Presumably, the scope of a court's review of alternative sites under the balancing test will be determined by the evidence plaintiff presents. If the evidence put forward by plaintiff establishes that appropriate alternative sites are available for the state's proposed activity, the state should have the burden of demonstrating the site it selected is preferable.[213] Absent some specific suggestions of alternative sites by plaintiff, it would be unreasonable to require the state to prove that the site it selected is preferable to all other siting possibilities. In theory, the number of available alternative sites may be virtually unlimited, or at least so large as to make trying the case unmanageable or the state's burden impossible to meet. Placing the burden of going forward on the plaintiff is not unreasonable, because before a case is considered by the courts under the balancing test, the state must demonstrate that it made a good faith effort to evaluate alternative sites.[214] Presumably, the content of the state's effort will be a matter of public record, and the alternative sites examined by the state are likely to be among the alternatives plaintiff will put forward for evaluation by the court. If plaintiff can credibly demonstrate that additional sites appropriate for the proposed use were not evaluated by the state, the court should refuse to decide the conflict under the balancing test because the state has failed to meet its good faith obligation. The state's obligation to conduct a good faith evaluation of alternative sites and make reasonable efforts to comply with local zoning restrictions is one of two threshold requirements that must be met before the courts will resolve the conflict under the balancing test.

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209. 63 Ohio St. 2d 282, 286, 407 N.E.2d 1365, 1368 (1980).

210. *Id.* at 286–87, 407 N.E.2d at 1368.

211. 293 Minn. 468, 472, 197 N.W.2d 426, 429 (1972).

212. *Id.*

213. The state should have the evidence on hand to meet this burden because *Brownfield* requires the state to undertake a good faith evaluation of alternative sites. *Id.*; *see* text accompanying notes 251–72 *infra.*

214. If plaintiffs have no burden of going forward and the burden of proof rests on the state, the state will be placed in the impossible position of proving a negative on an undefined issue. Plaintiff's burden of going forward with some evidence of alternative sites defines the issue by narrowing the area of factual controversy to those sites put forward by plaintiff.

B. *Limitations on Judicial Resolution of Conflicts under the Balancing Test*

Though *Brownfield* adopts a balancing test, it also strictly limits resort to the test by setting up two threshold requirements that must be met prior to the judicial balancing inquiry. First, "direct statutory grant[s] of immunity" will control when they exist.[215] Second, when statutory grants of immunity are not present, the court will not resolve conflicts under the balancing test unless the state has made a reasonable good faith attempt to comply with local zoning restrictions.[216]

Brownfield's deference to direct statutory grants of immunity substantially limits, but does not eliminate entirely, resort to judicial resolution of conflicts between state activities and local zoning restrictions. Statutory grants of immunity from local zoning restrictions, while seemingly broad on their face, are surprisingly limited on analysis.

The principle statutory provision granting to government agencies immunity from local zoning restrictions is section 713.02 of the Ohio Revised Code.[217] This section confers upon city planning commissions the power to

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215. The controlling nature of statutory grants of immunity is indicated by the following language of the court: "Thus, *unless there exists a direct statutory grant of immunity in a given instance*, the condemning or land-owning authority must make a reasonable attempt to comply with the zoning restrictions of the affected political subdivision." 63 Ohio St. 2d 282, 286, 407 N.E.2d 1365, 1368 (1980) (emphasis added).

216. *See* text accompanying notes 251–72 *infra*.

217. OHIO REV. CODE ANN. § 713.02 (Page 1979). This section provides, in pertinent part:

> The planning commission established under section 713.01 of the Revised Code shall make plans and maps of the whole or any portion of the municipal corporation, and of any land outside thereof, which, in the opinion of the commission, is related to the planning of the municipal corporation, and make changes in such plans or maps when it deems it advisable. Such maps or plans shall show the commission's recommendations for the general location, character, and extent of streets, alleys, ways, viaducts, bridges, waterways, waterfronts, subways, boulevards, parkways, parks, playgrounds, avia tion fields and other public grounds, ways, and open spaces; the general location of public buildings and other public property; the general location and extent of public utilities and terminals, whether publicly or privately owned or operated, for water, light, sanitation, transportation, communication, power, and other purposes; and the removal, relocation, widening, narrowing, vacating, abandonment, change of use or extension of such public ways, grounds, open spaces, buildings, property, utilities, or terminals. With a view to the systematic planning of the municipal corporation, the commission may make recommendations to public officials concerning the general location, character, and extent of any such public ways, grounds, open spaces, buildings, property, utilities, or terminals. . . . This section does not confer any powers on the commission with respect to the construction, maintenance, use, or enlargement of improvements by any public utility or railroad on its own property if such utility is owned or operated by an individual, partnership, association, or a corporation for profit.
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> . . . .
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> Whenever the commission makes a plan of the municipal corporation, or any portion thereof, no public building or structure, street, boulevard, parkway, park, playground, public ground, canal, river front, harbor, dock, wharf, bridge, viaduct, tunnel, or other public way, ground, works, or utility, whether publicly or privately owned, or a part thereof, shall be constructed or authorized to be constructed in the municipal corporation or planned portion thereof unless the location, character, and extent thereof is approved by the commission. In case of disapproval the commission shall communicate its reasons therefor to the legislative authority of the municipal corporation and to the head of the department which has control of the construction of the proposed improvement or utility. The legislative authority, by a vote of not less than two-thirds of its members and of such department head, together may overrule such disapproval. If such public way, ground, works, building, structure, or utility is one the authorization or financing of which does not, under the law or charter provisions governing it, fall within the province of a municipal legislative authority or other municipal body or official, the submission to the commission shall be by the state, school, county, district, or township official, board, commission, or body by a vote of not less than two-thirds of its membership. The

establish comprehensive zoning schemes and contains specific provisions detailing the authority that planning commissions have over public improvements undertaken by the state, its authorized agents, and local subdivisions. Under this section, the planning commission must, in its comprehensive plan, make recommendations for (1) the general location, character, and extent of public ways, aviation fields, and other public grounds, (2) the general location of public buildings and other public property, and (3) the general location and extent of utilities, whether publicly or privately owned.[218] In spite of these requirements, the section removes privately owned and operated utilities from the binding authority of the planning commission[219] and establishes a mechanism for withdrawing the public improvements of government from the authority of the commission.

The statutory immunity provisions for government public improvements are procedural. The statute first provides that the planning commission shall have authority to approve the construction or proposed construction of public buildings, ways, and utilities in areas subject to the commission's plan.[220] In case of disapproval, the commission must communicate its reasons to the appropriate officials of the state or local government unit or agency authorizing the improvement in the first instance.[221] These officials may, by a minimum two-thirds vote, overrule the disapproval of the planning commission and proceed with construction.[222] Significantly, the planning commission's approval is required, and the appropriate agency may overrule its disapproval, only when the project involves the *construction* of public improvements.[223] By its terms, the statute has no application to land acquisitions and uses that do not require construction. When the commission is not vested with the authority to approve or disapprove public construction projects, it may nonetheless make recommendations regarding appropriate locations for public structures.[224] This ensures some consideration of local zoning interests despite the absence of any authority to compel compliance with local zoning restrictions.

The second limitation on resort to the balancing test applies only when there is no direct legislative grant of immunity.[225] *Brownfield* requires that under such circumstances "the condemning or land-owning authority must

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narrowing, ornamentation, vacation, or change in the use of streets or other public ways, grounds, and places shall be subject to similar approval, and disapproval may be similarly overruled. The commission may make recommendations to any public authorities or to any corporations or individuals in such municipal corporation or the territory contiguous thereto, concerning the location of any buildings, structures, or works to be erected or constructed by them.

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.*

225. A direct grant of immunity is controlling and will end a court's inquiry under the balancing test. *See* note 215 *supra*.

make a reasonable attempt to comply with the zoning restrictions of the affected political subdivision."[226] The clear implication of this language, as indicated by the disposition in *Brownfield,* is that the courts will not resort to the balancing test until they are satisfied that the state has undertaken such compliance efforts. *Brownfield* was not decided on the balancing test. Rather, the court remanded the case because "the state of Ohio made no effort to comply with the Akron zoning ordinance, nor does it appear that it considered the impact of the proposed halfway house on the surrounding neighborhood."[227] This language, together with other cases, indicates there are two components to the requirement that the state make a reasonable attempt to comply with local zoning restrictions.

First, *Brownfield* strongly and appropriately implies that a "reasonable attempt to comply with local zoning restrictions"[228] includes the exhaustion of administrative remedies available to the state under the local zoning scheme. This requirement was later made explicit in *Board of Education v. Puck.*[229]

In its recitation of facts the *Brownfield* court noted, "Neither the state nor its lessee sought zoning approval from the city of Akron for the proposed use of the premises."[230] And later, in the body of its opinion, the court strongly hinted at one administrative mechanism available to the state in *Brownfield*: "In the case *sub judice,* the city of Akron zoning ordinance permits, as a conditional use, a '[l]odging-house or hostel conducted for rehabilitation.' It was possible, therefore, for the state of Ohio to both purchase property for use as a halfway house and comply with the land use scheme of the city of Akron."[231] In other words, the city of Akron zoning ordinance permitted the operation of a halfway house as a conditional use in an area zoned single-family residential. The use is subject to the state's application for a conditional use permit from the local zoning authority and the authority's issuance of the permit. The theory underlying conditional uses is that activities so designated might be compatible with the general scheme of zoning for an area, but the city reserves the right to make that judgment on a case by case basis.[232] If a particular proposed activity, such as the halfway house in *Brownfield,* is incompatible with the surrounding neighborhood, the city may issue a permit subject to certain modifications in the state's proposed use that make the use fully compatible with the surrounding area.[233] Thus, two possible administrative resolutions of the conflict were open to the state in *Brownfield.* The city might have granted the state a conditional use permit had

226. Brownfield v. State, 63 Ohio St. 2d 282, 286, 407 N.E.2d 1365, 1368 (1980).

227. *Id.* at 287, 407 N.E.2d at 1368.

228. *Id.* at 286, 407 N.E.2d at 1368.

229. No. 999,280 (8th Judicial Dist. Ct. App. Ohio Nov. 20, 1980). *See* text accompanying notes 235–50 *infra.*

230. 63 Ohio St. 2d 282, 282, 407 N.E.2d 1365, 1366 (1980).

231. *Id.* at 285, 407 N.E.2d at 1367.

232. *See* note 110 *supra.*

233. *See* 8A E. MCQUILLIN, MUNICIPAL CORPORATIONS § 25.160 (3d ed. 1976).

the state made application, or the city might have issued a permit effective only if the state modified its proposed use.[234]

In addition to requiring the state to apply for a conditional use permit, *Brownfield* has also been interpreted to require the state to seek a variance for its activity. In *Board of Education v. Puck,*[235] the Eighth District Court of Appeals expanded on *Brownfield*'s requirement that administrative remedies must be exhausted before there is judicial consideration of the immunity issue. In *Puck,* the plaintiff-appellee Board of Education for the City of Cleveland proposed to use an abandoned school site for storage of "buses involved in the federal court-ordered desegregation plan."[236] The site was zoned, in part, "for general retail use,"[237] with the balance "zoned as a two-family district."[238] The Board of Education "applied to the [city] . . . for a [zoning] permit to use the abandoned school site as a storage yard for school buses,"[239] and when the permit was denied, the Board of Education applied to the Zoning Board of Appeals for a variance.[240] The Zoning Board "refused to grant a variance,"[241] and the Board of Education appealed to the trial court, which "ordered a permit to be issued."[242] The city then appealed to the Court of Appeals for the Eighth Judicial District.

In *Puck,* the court of appeals directly addressed *Brownfield*'s requirement that the state make "a reasonable attempt to comply with local zoning restrictions"[243] prior to judicial consideration of the immunity issue:

> The immunity issue arises only after efforts at compliance with municipal zoning have failed. In this case the school board applied for a permit for the desired use and, when that failed, sought a variance. It then appealed to Common Pleas Court. These attempts, if not efforts at compliance, demonstrate at least a respectful consideration of Cleveland zoning concerns and satisfy the prerequisite of a failed compliance effort before reaching the immunity issue.[244]

The *Puck* court was satisfied that application for a use permit, coupled with a subsequent application for a variance and appeal to the courts, "satisf[ied] the prerequisite of a failed compliance effort."[245] The immunity issue was therefore ripe for direct adjudication. Unfortunately, this issue was not decided by the court. "[T]he record [was] barren on" the determinants of immunity set forth in *Brownfield*[246] because it "was made before the [*Brownfield*] rule was

234. *See* notes 115 and 117 *supra.*
235. No. 999,280 (8th Judicial Dist. Ct. App. Ohio Nov. 20, 1980).
236. *Id.* at 2.
237. *Id.*
238. *Id.*
239. *Id.*
240. *Id.*
241. *Id.*
242. *Id.*
243. 63 Ohio St. 2d 282, 286, 407 N.E.2d 1365, 1368 (1980).
244. No. 999,280 (8th Judicial Dist. Ct. App. Ohio Nov. 20, 1980), slip op. at 5 (footnotes omitted).
245. *Id.* It remains open to question whether application for a variance should be required. *See* note 110 *supra.*
246. No. 999,280 (8th Judicial Dist. Ct. App. Ohio Nov. 20, 1980), slip op. at 6.

announced and both the Board of Zoning Appeals and Common Pleas Court came to [their] conclusions on the basis of a record and legal rulings made in response to a different rule."[247] The case was reversed and the cause remanded for further proceedings according to law.[248]

Puck clearly indicates that *Brownfield*'s "reasonable attempt[s] to comply with local zoning restrictions"[249] includes the exhaustion of administrative remedies. Moreover, it appears from the language of the opinion[250] that exhaustion of administrative remedies in the form of use permits and variances is the sole requirement of *Brownfield*'s "reasonable attempts" rule. This unduly restrictive view of the rule is subject to challenge based on the language of *Brownfield* and cases cited therein.

In remanding *Brownfield* for further consideration, the supreme court commented that "the state of Ohio made no effort to comply with the Akron zoning ordinance, *nor does it appear [the state] considered the impact of the proposed halfway house upon the surrounding neighborhood.*"[251] The emphasized language, together with an analysis of cases cited in the opinion, strongly suggests that there is a second component to the reasonable attempts requirement. The state must attempt to locate its facilities in a manner least detrimental to the local zoning scheme. This component, which was ignored by the court of appeals in *Puck*, requires the state to consider the impact of its proposed facility on the surrounding neighborhood and undertake a good faith evaluation of alternative sites for the facility. At the very least, the state may not act arbitrarily. If the state fails to take those steps, the reasonable attempts requirement has not been met and the immunity issue is not ripe for judicial determination.

Brownfield's reliance[252] on *Long Branch Division v. Cowan*[253] and *Township of Washington v. Village of Ridgewood*[254] confirms the existence of the second component of the "reasonable attempts" rule. In *Long Branch* the New Jersey Department of Health attempted to establish a residential drug rehabilitation center in the city of Long Branch. The center, formerly a parochial school, was located in an area zoned for residential use. The dominant land use in the area was one- and two-family homes.[255] The state purchased the school building and began renovation without applying for a use variance[256] or site plan approval[257] from the city, the board of adjustment, or

247. *Id.*
248. *Id.* at 7.
249. 63 Ohio St. 2d 282, 286, 407 N.E.2d 1365, 1368 (1980).
250. *See* text accompanying note 244 *supra.*
251. 63 Ohio St. 2d 282, 286, 407 N.E.2d 1365, 1368 (1980) (emphasis added).
252. *See id.* (citing Township of Washington v. Village of Ridgewood, 26 N.J. 578, 141 A.2d 308 (1958); Long Branch Div. v. Cowan, 119 N.J. Super. 306, 291 A.2d 381 (1972)).
253. 119 N.J. Super. 306, 291 A.2d 381 (1972).
254. 26 N.J. 578, 141 A.2d 308 (1958).
255. Long Branch Div. v. Cowan, 119 N.J. Super. 306, 308, 291 A.2d 381, 382 (1972).
256. *See* note 110 *supra.*
257. This term was not defined by the court.

the planning commission.[258] The center was intended to serve addicts from throughout the state.[259] Plaintiff-appellants sought an injunction against the establishment of the center.[260] The trial court granted the state's motion to dismiss plaintiff's complaint, holding that the state was immune from local zoning restrictions.[261]

On appeal, the Superior Court of New Jersey, Appellate Division, affirmed the trial court's immunity holding, but remanded the case to the lower court for further proceedings.[262] Though the appellate court agreed that immunity was properly granted, it found that the immunity was not "completely unbridled."[263] The state must act "in a reasonable fashion so as not to arbitrarily override all important legitimate local interest."[264] The remand was accompanied by an order that the trial court conduct further hearings on the issue of whether the state acted "unreasonably or arbitrarily" in the selection of the site.[265] The nature of this requirement is made clear in a second New Jersey case cited in *Brownfield, Township of Washington v. Village of Ridgewood.*[266] *Washington* indicates that the reasonable efforts requirement extends beyond a mere "arbitrariness" rule.

In *Washington,* the village of Ridgewood, in need of additional water storage capacity, selected a site for the construction of an elevated water tower. The site was on a tract of land located partially in Ridgewood and partially in the township of Washington. The area was zoned for residential use.[267] Washington Township and certain property owners therein brought suit to enjoin further construction after the water tower was approximately three-fourths complete.[268] The trial court held for plaintiffs and ordered the tower dismantled.[269]

On appeal, the Supreme Court of New Jersey held the Washington Township zoning ordinance inapplicable to Ridgewood, but affirmed the trial court on the ground that Ridgewood's actions were unreasonable in light of the facts. The court emphasized that reasonable alternatives were available and that these alternatives would better accommodate local zoning interests.[270] The alternatives included building a ground level rather than an elevated storage tank, or locating the tank at another site. Significantly, either

258. Long Branch Div. v. Cowan, 119 N.J. Super. 306, 308, 291 A.2d 381, 382 (1972).
259. *Id.*
260. *Id.*
261. *Id.*
262. *Id.* at 310, 291 A.2d at 383.
263. *Id.* at 309, 291 A.2d at 383.
264. *Id.*
265. *Id.* at 310, 291 A.2d at 383. Under the Superior Court's order, plaintiffs were to bear the burden of proving the state acted unreasonably or arbitrarily. *Id.*
266. 26 N.J. 578, 141 A.2d 308 (1958).
267. *Id.* at 580, 141 A.2d at 309.
268. *Id.* at 582, 141 A.2d at 310.
269. *Id.* at 580, 141 A.2d at 309.
270. *Id.* at 582, 584–86, 141 A.2d at 310, 311–12.

alternative would have increased Ridgewood's costs by more than twenty percent.[271]

Brownfield's reliance on *Long Branch* and *Washington* indicates that, before a court will consider a claim that an activity is immune from local zoning restrictions, the state must have made a reasonable attempt to accommodate the local zoning scheme by exploring alternative sites for its activity, and if none are appropriate, by modifying the nature of its activity to accommodate surrounding uses at the proposed site. Alternative sites and modifications must be considered even if they substantially increase the cost of the state's activity.[272]

At a minimum, *Brownfield* requires the exhaustion of administrative remedies and the state's good faith consideration of alternatives prior to a judicial resolution of the conflict under the balancing test. The wisdom of these requirements, as well as the strengths and weaknesses of the balancing test when it is finally applied by the courts, remains to be evaluated.

IV. Critical Analysis of the Balancing Test

The balancing of governmental interests test formulated in *Brownfield* successfully avoids most of the conceptual and practical problems of the eminent domain test and the governmental-proprietary use distinction. This is not to suggest, however, that the balancing test satisfactorily resolves all of the deficiencies of the alternative approaches for resolving conflicts between local zoning restrictions and state activities.

The principle conceptual advantage of the balancing test is its recognition that valid and legitimate public interests underlie the adoption and enforcement of local zoning restrictions. *Brownfield* requires that these interests be accounted for when conflicts between local zoning restrictions and state activities are addressed by the courts. The state must consider the impact of its proposed activities on surrounding neighborhoods when selecting sites for those activities,[273] and in applying the balancing test, the courts will evaluate alternative sites for the state's activities and consider the impact of those activities on surrounding property.[274]

By explicitly taking account of the interests served by local zoning restrictions, the balancing test recognizes and avoids the intractible problem faced by proponents of both the eminent domain test and the governmental-proprietary use distinction. These alternative approaches subordinate local zoning interests to the interests served by state activities, but they provide no justification for such an arbitrary choice. The eminent domain test rests on the assumption that the interests underlying local zoning restrictions are uniform-

271. *Id.* at 584–86, 141 A.2d at 311–12.
272. *Id.*
273. *See* text accompanying notes 251–72 *supra.*
274. *See* text accompanying notes 207–14 *supra.*

ly subordinate to the interests underlying the power of eminent domain.[275] The governmental-proprietary use distinction effects a more subtle subordination of zoning interests to the interests of the state by casting the state interests in the role of the sole determinative criteria for judicial resolution of immunity issues.[276] Proponents of either approach must therefore offer some principled basis for distinguishing the public interests served by zoning from the public interests served by the power of eminent domain or various state activities, and ultimately, the proponents must justify the subordination of zoning interests to state interests. The cases utilizing these approaches do not offer a principled basis for distinguishing and subordinating zoning interests, and this is their primary deficiency.[277]

If zoning interests are indistinguishable in principle from the interests served by state activities, it follows that zoning interests are neither superior nor inferior to the state's interests in undertaking land use activities. The eminent domain test and the governmental-proprietary use distinction place zoning interests in an inferior position. It is worth inquiring whether the balancing test does more than restore these interests to a position of equivalence. The balancing test appears to place substantial procedural burdens on the state and, in doing so, may effectively elevate zoning interests above the interests served by state activities.

Brownfield requires the state to undertake reasonable efforts to comply with local zoning restrictions.[278] Moreover, though it is not perfectly clear from the decision, the burden of justifying immunity appears to rest on the state, and state activities are presumed to be subject to local zoning restrictions until this burden is met.[279] Together, these requirements may place so many hurdles in the state's path that the state will elect not to pursue certain activities, or will undertake activities at less than optimal locations, rather than undertake reasonable efforts to comply with local zoning restrictions and bear the burden of proof in court.[280]

Several considerations mitigate the concern that *Brownfield* effectively places local zoning interests in a position superior to the interests of the state. First, while the costs of making a reasonable attempt to comply with local zoning restrictions and pursuing a judicial resolution of a conflict may be more

275. *See* text accompanying notes 89–104 *supra*.

276. *See* text accompanying notes 183–86 *supra*.

277. *See* text accompanying notes 64–67, 89–105, and 183–86 *supra*.

278. *See* text accompanying notes 226–72 *supra*.

279. The court in *Brownfield* framed the issue as follows: "The central issue raised by this appeal is whether a privately-operated, state-owned facility is *automatically exempt* from municipal zoning restrictions." 63 Ohio St. 2d 282, 284, 407 N.E.2d 1365, 1367 (1980) (emphasis added). Later in the opinion, the court lists factors that should be considered "in determining *whether the proposed use should be immune* from zoning laws." *Id.* at 287, 407 N.E.2d at 1368 (emphasis added). No longer is the use "automatically exempt" from local zoning restrictions. The presumption has shifted against the state and, presumably, so has the burden of proof. *But see* Long Branch Div. v. Cowan, 119 N.J. Super. 306, 310, 291 A.2d 381, 383 (1972) (plaintiffs bear burden of proving state acted unreasonably or arbitrarily in selection of site for residential drug rehabilitation center to support withholding of grant of immunity).

280. The impact on the sum of all state activities should be negligible, since the state can exempt its own construction projects from local zoning restrictions. *See* note 217 *supra* and text accompanying note 281 *infra*.

than trivial, there is no reason to believe they are prohibitive. If the state elects not to undertake an activity because the costs of following *Brownfield*'s procedures exceed the benefits of undertaking the activity, benefits from the activity are probably not that great. If the benefits are more than marginal, the undertaking is worth the costs of complying with *Brownfield*.

Two further considerations justify imposing the burden of proof on the state in a judicial proceeding under the balancing test. First, the burden of proof merely expresses a preference for the set of interests served by zoning; it does not resolve the immunity issue based solely on zoning interests. The government unit seeking immunity is provided the opportunity to meet the burden under the balancing test. In contrast, the eminent domain test and the governmental-proprietary use distinction resolve the question of immunity without reference to the weight of opposing interests.

The second consideration supporting the imposition of the burden of proof on the authority seeking immunity is applicable to situations in which the authority is the state. State capital improvement projects and land acquisitions are authorized by the legislature, which has the authority to enact direct grants of immunity for particular state activities. Since, in the final analysis, the legislature controls the immunity question, "it seems justifiable to place upon it the burden of reversing a reasonable presumption as to what its intent would be."[281]

Overall, the *Brownfield* balancing test imposes procedural burdens on the state that may tend to effectively subordinate the state's interests to the interests supported by zoning. The degree of subordination, however, is both minimal and justified. As a result, *Brownfield*'s conceptual difficulties pale in contrast to the conceptual difficulties of the eminent domain test and the governmental-proprietary use distinction.

The essential practical difficulty shared by the eminent domain test and the governmental-proprietary use distinction is one of unjustified overbroad application. The source of this difficulty in the eminent domain test is the absence of any requirement that administrative remedies be exhausted prior to a judicial resolution of a conflict between local zoning restrictions and the power of eminent domain.[282] Moreover, overbroad applications of the test cannot be effectively eliminated because the predictability of outcomes when the test is applied is a disincentive to good faith efforts at accommodation in administrative processes.[283] The governmental-proprietary use distinction suffers from similar infirmities of overbreadth because it is premised on the assumption that the unbridled power to select sites for governmental uses is essential to the fulfillment of government duties, and like the eminent domain test, it has no exhaustion of administrative remedies requirement.[284]

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281. Note, *Municipal Power to Regulate Building Construction and Land Use by Other State Agencies*, 49 MINN. L. REV. 284, 298 (1964).

282. *See* text accompanying notes 106–20 *supra*.

283. *See* text accompanying notes 121–31 *supra*.

284. *See* text accompanying notes 177–82 *supra*.

The essence of the overbreadth problem under the eminent domain test and the governmental-proprietary use distinction is that resort to these tests prior to the exhaustion of administrative remedies eliminates the possibility of a nonjudicial resolution of the conflict through accommodation.[285] The judicial tests present all-or-nothing choices. The zoning power is either fully served and the state's interests completely disserved, or the state's interests are fully served and the zoning power completely disserved.[286] The administrative process, by contrast, holds mechanisms for accommodation that may yield a more balanced result serving a broader range of public interests.[287] The courts should therefore require resort to nonjudicial administrative remedies that heighten the prospects for accommodation. *Brownfield*'s balancing test is structured to serve this goal.

Under *Brownfield,* judicial resolution of conflicts between local zoning restrictions and state activities carries the same disadvantages as judicial resolution under the alternative approaches. *Brownfield* alters the decision-making criteria to a balancing of governmental interests,[288] but the ultimate outcome is still an all-or-nothing proposition that serves one set of public interests at the expense of another. Balancing is a conceptually stronger basis for preferring the zoning power or the state's activity,[289] but a judicial resolution of the conflict is still to be avoided where possible because nonjudicial resolutions by accommodation serve more of the interests implicated in the conflict.[290] *Brownfield* serves this goal by requiring the exhaustion of administrative remedies prior to judicial resolution of conflicts under the balancing test.[291] This requirement, coupled with the absence of highly predictable results under the balancing test, eliminates disincentives to good faith attempts at accommodation by the parties to a conflict.[292]

The absence of highly predictable results under the balancing test is caused by the test's single difficulty—vagueness. As with the governmental-proprietary use distinction,[293] the balancing test suffers from some degree of vagueness and lack of predictability. Even in this respect, however, the balancing test is superior to the governmental-proprietary use distinction because the vagueness in the balancing test is far less severe.

The governmental-proprietary use distinction is unworkably vague because "no satisfactory basis for solving the problem whether the activity falls into one class or other has been evolved."[294] The sole determinative criteria

285. *See* text accompanying notes 114–20 and 178–82 *supra.*

286. *Id.*

287. *See* text accompanying notes 114–20 *supra.*

288. *See* text accompanying notes 187–214 *supra.*

289. *See* text accompanying notes 273–77 *supra.*

290. Even under *Brownfield*'s balancing test, a court must ultimately decide whether zoning restrictions or the state's activity will prevail.

291. *See* text accompanying notes 228–50 *supra.*

292. *See* text accompanying notes 121–31 *supra.*

293. *See* text accompanying notes 171–76 *supra.*

294. Seasongood, *Municipal Corporations: Objections to the Governmental or Proprietary Test,* 22 VA. L. REV. 910, 938 (1936).

for distinguishing governmental uses from proprietary uses is that governmental uses are supported by "public necessity."[295] The public necessity criteria is so vague that cases relying on the governmental-proprietary use distinction seem often to state conclusions rather than reason to results.[296] Ohio courts may approach decisions under the balancing test in a similar fashion if they rely solely on *Brownfield*'s general statement that "the correct approach . . . would be in each instance to weigh the general public purposes to be served by the exercise of each power, and to resolve the impasse in favor of that power which will serve the needs of the greater number of our citizens."[297] This language, however, is merely a statement of principle, and *Brownfield* gives further guidance by specifying considerations relevant to the balancing decision. The courts are to consider "the essential nature of the government-owned facility, the impact of the facility upon surrounding property, and the alternative locations available for the facility."[298] This specification of factors relevant to the balancing decision lends substance to the statement of principle underlying the balancing test, and further clarification is afforded by an analysis of the cases relied on by *Brownfield*.[299] These clarifications do not, however, eliminate all the vagueness from the balancing test.

The quantum of vagueness remaining in the balancing test after the clarifications afforded by *Brownfield*'s specification of relevant factors and an analysis of other decisions is partially a function of the absence of a developed body of case law applying the test and partially a function of the inherent nature of the test. Vagueness attributable to the absence of case law should diminish over time as the courts apply the test in a greater number of cases. Application of the test should, for example, clarify questions regarding matters such as the scope of a court's responsibility to evaluate alternative sites for the state's activities,[300] but even with these clarifications the test will retain a certain quantum of vagueness inherent in the nature of balancing.

Under the balancing test, the outcome of each case will turn on a range of facts and circumstances, not on a single and clear determinative factor.[301] As a result, judicial outcomes under the balancing test will never be as predictable as outcomes under the eminent domain test.[302] In the zoning context,

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295. *See* text accompanying notes 138–66 *supra*.

296. *See, e.g.*, Nehrbas v. Village of Lloyd Harbor, 2 N.Y.2d 190, 195, 140 N.E.2d 241, 243, 159 N.Y.S.2d 145, 148–49 (1957) ("Whatever the view may have been years ago . . . (garbage collection) must today be stamped a governmental function.").

297. 63 Ohio St. 2d 282, 285, 407 N.E.2d 1365, 1367 (1980).

298. *Id.* at 286–87, 407 N.E.2d at 1368.

299. *See* text accompanying notes 189–206 *supra*.

300. *See* text accompanying notes 207–14 *supra*.

301. The eminent domain test relies solely on the presence or absence of a power of eminent domain to decide the immunity issue. *See* text accompanying notes 31–33 *supra*. By contrast, decisions under the *Brownfield* balancing test are made on the weight of the general public purposes served by the zoning power and the state activity "in each instance." 63 Ohio St. 2d 282, 285, 407 N.E.2d 1365, 1367 (1980).

302. The eminent domain test is inherently "mechanical" in contrast to the balancing test's case by case approach. Note, *Municipal Power to Regulate Building Construction and Land Use by Other State Agencies*, 49 MINN. L. REV. 284, 285 (1964).

there is a tradeoff between the qualities of the various tests. Results under the eminent domain test are highly predictable, but predictability is achieved by relying on an unprincipled distinction between the public interests supported by the power of eminent domain and the public interests served by the zoning power.[303] The balancing test avoids the problem of unprincipled distinctions because it recognizes the validity of the public interests served by both the zoning power and state activities and it balances these interests on a case by case basis. This approach yields less predictable judicial outcomes, but since a primary value served by predictable results is judicial economy and the eminent domain test disserves this value by encouraging judicial resolution of disputes,[304] predictability should not count as a reason for preferring the approach of the eminent domain test. The vagueness and lack of predictability in the balancing test are the justified costs of the only conceptually sound approach to resolving conflicts between local zoning restrictions and state activities.

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303. *See* text accompanying notes 89–105 *supra*.
304. *See* text accompanying notes 121–31 *supra*.